STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FDR SERVICES CORPORATION OF FLORIDA, Petitioner, vs. STATE OF FLORIDA, DEPARTMENT OF REVENUE, Respondent.	)	CASE NO. 95-3038RX

FINAL ORDER

Notice was provided and on October 3, 1995, a formal hearing was held in this case. Authority for conducting the hearing is set forth in Section 120.57(1), Florida Statutes. The hearing location was the Office of the Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida. Charles C. Adams was the hearing officer.

APPEARANCES

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For Respondent: James McAuley, Assistant Attorney General
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STATEMENT OF ISSUES

Is Department of Revenue Rule 12A-1.096(1)(b),(1)(d), (4), and (5)(e)1, Florida Administrative Code, an invalid exercise of delegated legislative authority? See Section 120.52(8), Florida Statutes.

PRELIMINARY STATEMENT

On June 16, 1995, Petitioner filed a petition claiming that it was entitled to a temporary tax exemption permit and a refund of the full amount of the sales and use tax with interest which it had paid Respondent under protest. To resolve the dispute, Respondent transmitted the case to the Division of Administrative Hearings on June 21, 1995, where it was assigned DOAH Case No. 95-3113.

On June 16, 1995, Petitioner, consistent with Section 120.52(8)(c), Florida Statutes, filed a petition for administrative determination of the invalidity of Rule 12A-1.096(1)(b), (1)(d), (4), and (5)(e)1, Florida Administrative Code. In that petition, it is alleged that the rule enlarges, modifies or contravenes Section 212.08(5)(b), Florida Statutes, by imposing additional requirements to obtain the tax exemption permit described in Section 212.08(5)(a) and (b)3.a, Florida Statutes. By order dated June 23, 1995, the Assistant Director of the Division of Administrative Hearings assigned the undersigned to consider the rule challenge. The order of assignment established DOAH Case No. 95-3038RX.

Petitioner moved to consolidate DOAH Case No. 95-3038RX and DOAH Case No. 95-3113. The parties also stipulated to extend the 30-day time limit for considering the rule challenge. See Section 120.56(2), Florida Statutes. The motion to consolidate was granted. The cases were consolidated for hearing purposes only. Notice was provided and the cases were heard on the aforementioned date.

At the consolidated hearing the parties presented a "joint prehearing stipulation and statement" which contained stipulated facts. Those fact stipulations were accepted and formed the basis for fact determination, as supplemented with additional facts. The parties submitted the fact stipulations in lieu of the presentation of testimony and tangible evidence. The parties were granted ten days from the hearing date to submit proposed final and recommended orders in the consolidated cases. Respondent requested an extension for filing those proposals. Petitioner did not oppose the extension. The parties were allowed to file their proposals on October 20, 1995. The proposals were timely filed. The requirement to discuss proposed facts by the parties in accordance with Section 120.59, Florida Statutes has been precluded, because the underlying facts in the cases were agreed to.

FINDINGS OF FACT

FACTS UPON STIPULATION

1. Petitioner opened a new commercial laundry facility in Pompano Beach, Florida, in 1993.

2. Petitioner installed in the new facility machinery and equipment costing approximately $1,400,000.00 for the purposes of cleaning and processing linens used by hospitals in the south Florida area (the "Laundry Equipment").

3. Petitioner charges a fee to hospitals in the south Florida area for cleaning and processing the hospitals' linens with the Laundry Equipment.

4. The new facilities are additional, not replacement, facilities.

5. The Laundry Equipment:

(a) Qualifies as "industrial machinery and equipment", as defined by Section 212.08(5)(b) and (6)(c), Florida Statutes;

(b) Was purchased by Petitioner for use in a new business;

(c) Processes items of tangible personal property, the hospital's linens, at a fixed location;

(d) Was purchased before Petitioner first began its productive operations and delivery was made within 12 months of that date; and

(e) Has increased productive output at Petitioner's commercial laundry facility.

6. The equipment included a tunnel washer system, conveyers, feeders/folders, ironers, a boiler, and air compressors.

7. By application dated September 3, 1993, Petitioner applied for a temporary tax exemption permit with respect to the Laundry Equipment which it planned to purchase for use in its new business.

8. Section 212.08(5)(b), Florida Statutes, requires that a taxpayer obtain that permit to receive the exemption.

9. The Department denied Petitioner's application.

10. On August 22, 1994, Petitioner paid to the Department, under protest, the sum of $18,095.36, which represented the tax of $16,773.98, plus interest of $1,321.38, on Petitioner's purchase of the Laundry Equipment.

11. Petitioner timely filed its claim for refund, which the Department denied.

12. Respondent denied Petitioner's request for a temporary tax exemption permit, and Respondent denied Petitioner's refund claim based upon Rule 12A-1.096, Florida Administrative Code.

13. Petitioner's request for a tax exemption permit and Petitioner's refund claim are based upon the exemption provided in Section 212.08(5)(b), Florida Statutes, which applies to a new (as opposed to an expanding) business.

CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to Sections 120.56 and 120.57, Florida Statutes.

15. In challenging Rule 12A-1.096(1)(b), (1)(d), (4) and (5)(e), Florida Administrative Code, Petitioner bears the burden of proving its allegations. See Agrico Chemical Co. v. State, Dept. of Environ. Reg., 365 So.2d 759 (Fla. 1st DCA 1978) cert. denied, 376 So.2d 74 (Fla. 1979).

16. Before Petitioner may advance its challenge it must demonstrate that it has standing as a "substantially affected" party. See Section 120.57(1), Florida Statutes and Florida Soc'y of Ophthalmology v. Board of Optometry, 532 So.2d 1279 (Fla. 1st DCA 1988), rev. denied, 542 So.2d 1333 (Fla. 1989); Agrico Chemical Co. v. State Dept. of Environ. Reg., 406 So.2d 478 (Fla. 2nd DCA 1981), and Professional Firefighters of Florida, Inc. v. State Dept. of Health and Rehab. Serv., 396 So.2d 1194 (Fla. 1st DCA 1981). In accordance with the standard, Petitioner has shown that its interests are substantially affected by the rule in question and Petitioner has standing to challenge the rule.

17. The grounds for the challenge are as set forth in Section 120.52(8)(c), Florida Statutes, wherein the Petitioner may succeed in its challenge if it shows that the rule is "an invalid exercise of delegated legislative authority." In particular, Section 120.52(8)(c), Florida Statutes states:

> (8) 'Invalid exercise of delegated legislative authority' means action which goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one or more of the following apply:
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> * * *
>
> (c) The rules enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(7);

18. Petitioner may not prevail in its challenge if the rule is reasonably related to the purpose of the enabling legislation. See Dept. of Corrections v. Hargrove, 615 So.2d 199 (Fla. 1st DCA 1993).

19. In pertinent part the enabling legislation, Section 212.08(5), Florida Statutes, states:

> 212.08 Sales, rental, use, consumption, distribution, and storage tax; specified exemptions. The sale at retail, the rental, the use, the consumption, the distribution, and the storage to be used or consumed in this state of the following are herby specifically exempt from the tax imposed by this part.
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> * * *
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> (5) EXEMPTIONS; ACCOUNT OF USE.
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> (b) Machinery and equipment used to increase productive output.--
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> 1. Industrial machinery and equipment purchased for use in new businesses which manufacture, process, compound, or produce for sales, or for exclusive use in spaceport activities as defined in s. 212.02, items of tangible personal property at fixed locations are exempt from the tax imposed by this chapter upon an affirmative showing by the taxpayer to the satisfaction of the department that such items are used in a new business in this state. Such purchases must be made prior to the date the business first begins its productive operations, and delivery of the purchases item must be made within 12 months of that date.
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> * * *
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> 3.a. To receive an exemption provided by subparagraph 1., a qualifying business entity shall apply to the department for a temporary tax exemption permit. The application shall state that a new business exemption or expanded business exemption is being sought. Upon a tentative affirmative

> determination by the department pursuant to subparagraph 1. . . ., the department shall issue such permit.
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> 4. The department shall promulgate rules governing applications for, issuance of, and the form of temporary tax exemption permits; provisions for recapture of taxes; and the manner and form of refund applications and may establish guidelines as to the requisites for an affirmative showing of increased productive output, commencement of production, and qualification for exemption.
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> * * *
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> 6. For the purposes of the exemptions provided in subparagraph[s] 1. . . . , these terms have the following meanings:
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> a. 'Industrial machinery and equipment' means 'section 38 property' as defined in s. 48(a)(1)(A) and (B)(i) of the Internal Revenue Code, provided 'industrial machinery and equipment' shall be construed by regulations adopted by the Department of Revenue to mean tangible property used as an integral part of the manufacturing, processing, compounding, or producing for sale, or for exclusive use in spaceport activities as defined in s. 212.02, of items of tangible personal property. Such term includes parts and accessories only to the extent that the exemption thereof is consistent with the provisions of this paragraph.

20. The portions of Rule 12A-1.096, Florida Administrative Code, that are challenged state:

> 12A-1.096 Industrial Machinery and Equipment for Use in a New or Expanding Business.
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> (1) Definitions -- The following terms and phrases when used in this rule shall have the meaning ascribed to them except where the context clearly indicates a different meaning:
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> * * *
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> (b) 'Industrial machinery and equipment' means 'Section 38 Property' as defined in Section 48(a)(1)(A) and (B)(i) of the United States Internal Revenue Code, as amended, and includes parts and accessories, essential to the manufacturing, processing, compounding or producing of tangible personal property for sale, or for exclusive use in spaceport activities as defined in s.212.02, F.S. 'Industrial machinery and equipment' also means pollution control equipment, or sanitizing and sterilizing equipment which is essential to manufacturing, processing, compounding or producing items of tangible personal property. 'Industrial machinery and equipment' also means monitoring machinery and equipment which is essential to manufacturing, processing, compounding or producing items of tangible personal property. In determining

> what is essential to manufacturing, processing, compounding or producing items of tangible personal property, the examination will not turn on how vertically integrated the taxpayer is but rather on the specific activity that the taxpayer asserts is part of the production process. For example, if the activity is essentially one of transportation or storage, associated equipment and machinery will not qualify for exemption unless specifically exempted in subsection (8) of this rule.
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> (d) 'Process' means a series of operations conducing to an end which is an item of tangible personal property for sale or for exclusive use in spaceport activities as defined in s. 212.02, F.S.
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> (5) Temporary Tax Exemption Permit -- Refund.
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> (e) The right to a refund of sales or use taxes.
>
> 1. The right to a refund of sales or use taxes paid on qualifying industrial machinery and equipment, or installation thereof, shall accrue when the new business first places a product in inventory or immediately sells a product.

21. Moreover, 12A-1.096(4) Florida Statutes, set forth a "Decision Flow Chart" that is designed to graphically illustrate the analysis for determining whether any tax exemption applies. In that chart there is a requirement that tangible personal property be "produced for sale or for exclusive use in Space Sport activities" before taxpayers are entitled to the exemption.

22. This case turns upon whether the phrase "for sale" in Section 212.08(5)(b)1, Florida Statutes, modifies the verbs manufacture, process, compound and produce or only modifies the latter verb. To resolve the issue the legislature's intent must be determined.

23. Use of the review standards employed by courts in determining legislative intent are appropriate in resolving this case.

24. Courts ascertain the legislative intent by giving generally accepted construction to the phraseology of a statute and to the manner in which it is punctuated. See Florida State Racing Commission v. Bourquardez, 42 So.2d 87 (Fla. 1949). In addition, to understand the proper application of a statute, one must determine the purpose of the legislation. See Devin v. Hollywood, 351 So.2d 1022 (Fla. 4th DCA 1976). That legislative purpose is drawn from the language of the statute. See S.R.G. Corp. v. Dept. of Revenue, 365 So.2d 687 (Fla. 1978). When a statute is drafted to clearly convey a specific meaning, the proper function of the Court and this forum is to effectuate this stated legislative intent. See Larrabee v. Capeletti Bros., Inc., 158 So.2d 540 (Fla. 3rd DCA 1963).

25. Courts and this forum are bound by the definite sentence structure in a statute. See State v. Perez, 531 So.2d 961 (Fla. 1988).

26. "Even where a court is convinced that the Legislature really meant and intended something not expressed in the sentence structure of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity." State v. Egan, 287 So.2d 1,4 (Fla. 1973).

27. Once the statutory meaning is understood the rule can then be examined to determine whether it enlarges, modifies or contravenes the provisions of the statute. See State Dept of Bus. Reg. v. Salvation Ltd., 452 So.2d 65 (Fla. 1st DCA 1984).

28. In determining the statutory meaning, Respondent's interpretation is ordinarily accorded deference. See Board of Trustees of the Internal Improvement Trust Fund v. Levy, 20 Fla.L.Weekly, D1522 (Fla. 1st DCA, June 27, 1995) and Orange Park Kennel Club, Inc. v. State, Dept. of Business and Professional Regulation, 644 So.2d 574 (Fla. 1stDCA 1994). But that deference is not accorded if Respondent's interpretation conflicts with the intent of the statute. See Mayo Clinic v. Dept. of Prof. Reg., 625 So.2d 918 (Fla. 1st DCA 1993).

29. In deciding the meaning of the statute, that decision is reached in recognition that tax exemptions are special privileges or immunities, granted by the sovereign only upon the occasion and to the extent that they are deemed to conserve the general welfare. See Lummus v. Florida Adirondack School, Inc., 168 So. 232 (Fla. 1936). But the appropriate disposition of the exemption claim would prohibit Respondent from reading the statute in a manner that is not expressed in the language of the exemption. See Green v. Eglin AFB Housing, Inc., 104 So.2d 463 (Fla. 1st DCA 1958).

30. In passing Section 212.08(5)(b)1, Florida Statutes, the placement of a comma after the word "produce", and before the modifying phrase "for sale", would have clarified the legislative intent concerning the desire to modify the verbs manufacture, process and compound, as well as the verb produce, when indicating that the industrial machinery and equipment purchase for use in a new business must ultimately lead to the availability of tangible personal property for sale and not for purposes other than sale. Absent that punctuation, can the language be construed to produce the same result as with the punctuation? The answer is yes.

31. When the cited provisions within Section 212.08(5), Florida Statutes, are read in context it does not appear that the legislature intended that new businesses who purchased machinery and equipment to produce items of tangible personal property could only claim exemption when that tangible personal property was subject to sale, while other entities who started new businesses and purchased industrial machinery and equipment for use in the new businesses and who engaged in manufacturing, processing or compounding of items of tangible personal property with no statutory limitation expressed as to the intended disposition of that property would likewise be entitled to the exemption. With that reading those manufacturing, processing and compounding would be entitled to pursue a larger range of activities involving the ultimate use of the items of tangible personal property not limited to the intent to offer that tangible personal property for sale. That in a setting in which the statute does not provide reasons why the manufacture, processing or compounding of tangible personal property should be treated differently than the production of tangible personal property. Failing an explanation for a dissimilar treatment of those categories of activities by the new business entities, this statutory construction would run contrary to the notion that exemptions are special privileges or immunities granted only to the extent that the exemptions may be

deemed to conserve the general welfare. A reading which does not extend the modifying term for sale to the verbs manufacture, process and compound, as well as the verb produce, is illogical.

32. The more reasonable statutory construction is one in which those new businesses who manufacture, process and compound tangible personal property are treated the same as those who produce tangible personal property. In that reading the modifying phrase "for sale" must be accounted for, in opposition to the idea that the modifying phrase should be ignored and all activities by those who manufacture, process, compound or produce items of tangible personal property, regardless of the intended disposition of that property, should be entitled to exemption for the payment of tax related to the purchase of the industrial machinery and equipment. When the modifying phrase "for sale" is employed in a uniform manner related to new businesses who manufacture, process, compound or produce items of tangible personal property a reasonable result pertains. Given that construction, Rule 12A-1.096(1)(b),(1)(d),(4), and (5)(e)1, Florida Administrative Code, is a valid exercise of delegated legislative authority.

It is therefore,

ORDERED:

That the petition challenging Rule 12A-1.096(1)(b),(1)(d), (4), and (5)(e)1, Florida Administrative Code, is dismissed.

DONE and ORDERED this 13th day of November, 1995, in Tallahassee, Florida.

_____

CHARLES C. ADAMS, Hearing Officer
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Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of November, 1995.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Appeal with the Agency Clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The Notice of Appeal must be filed within 30 days of rendition of the order to be reviewed.