STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DAYTONA WHEELS, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 95-4771
	)	
STATE OF FLORIDA,	)	
DEPARTMENT OF REVENUE,	)	
	)	
Respondent.	)	

RECOMMENDED ORDER

Upon due notice, this cause came on for formal hearing on August 6, 1998, in Daytona Beach, Florida, before Ella Jane P. Davis, a duly assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Edgar M. Dunn, Jr., Esquire
Post Office Drawer 2600
Daytona Beach, Florida 32115-2600

For Respondent: James McAuley, Esquire
Scott M. Covell, Esquire
Department of Legal Affairs
The Capitol, Tax Section
Tallahassee, Florida 32399-1050

STATEMENT OF THE ISSUE

Whether Respondent Florida Department of Revenue (FDOR) is entitled to further remittance as a result of a waste tire fee audit of Petitioner Daytona Wheels covering the period of January 1, 1989 to December 31, 1992 (the "audit period").

PRELIMINARY STATEMENT

FDOR conducted a sales tax compliance audit and a waste tire

fee audit of Petitioner taxpayer Daytona Wheels, covering the same period from January 1, 1989 to December 31, 1992 (the "audit period").

Petitioner timely paid the minimal sales tax assessed. For purposes of this proceeding, it was agreed that Daytona Wheels timely remitted the statutory amount of waste tire fees due on the number of new tires sold during the audit period, but FDOR alleges that Daytona Wheels owes $32,961.82 in waste tire fees as "tax," plus a civil non-fraud penalty of $8,133.43, plus interest of $6,764.53, for a total of $47,859.78, plus interest accruing on the $32,961.82 since February 12, 1993, at the rate of $10.89 per day, totaling another $20,650.20.

Petitioner timely requested formal hearing.

Motions for continuance or abeyance were granted by orders entered on February 13, 1996; April 12, 1996; August 20, 1996; December 18, 1996; March 12, 1997; and October 30, 1997. Due to the parties' failure to fully comply with repeated orders of prehearing instruction, formal hearing scheduled for February 19-20, 1998, was cancelled. On March 6, 1998, an Order of Continuance to Date Certain was mailed, rescheduling formal hearing for June 24-25, 1998. On April 16, 1998, a Renotice of Hearing rescheduled this cause for August 5-7, 1998. Ultimately, formal hearing was conducted solely on August 6, 1998.

At formal hearing, Petitioner filed a Trial Memorandum of Law. The Prehearing Stipulation was admitted in evidence as Exhibit ALJ-A. Respondent FDOR presented the oral testimony of

Marvin Cook, Samuel B. Eckhardt, Melody Stevens, and Stephen J. Brown. FDOR's Exhibits 1 and 2 and Joint Exhibits 1-17 were admitted in evidence. Petitioner presented the oral testimony of Melody Stevens, Paul Stevens, and Samuel B. Eckhardt.

The parties having agreed that FDOR should go first in the order of proof, Petitioner moved to dismiss at the close of FDOR's case-in-chief. After oral argument, this motion was treated as a Motion for Summary Recommended Order and denied. Petitioner's motion was renewed at the close of all evidence and was taken under advisement for resolution within this Recommended Order.

A transcript of proceedings was filed with the Division of Administrative Hearings on August 27, 1998. After agreed extensions of time, the parties filed their respective Proposed Recommended Orders on October 14, 1998.

FINDINGS OF FACT

1. Petitioner Daytona Wheels, d/b/a as Stevens' Oil Co. & Tire Warehouse, is a family-owned, retail tire dealer with two stores located in Daytona Beach, Florida.

2. FDOR conducted a sales tax compliance audit and a waste tire fee audit covering the same period from January 1, 1989, to December 31, 1992 (the "audit period"). The sales tax audit resulted in an assessment of only $220.64, plus interest. The increase in tax resulted from Petitioner's failure to charge sales tax for materials used in making small repairs and

adjustments (i.e., fixing flat tires, wheel balancing, etc.). Only a nominal civil penalty of $5.00 was imposed because the taxpayer's "overall error ratio . . . [was] very small." The sales tax audit of Daytona Wheels further showed that the taxpayer was generally compliant with the state sales tax law.

3. The audit of waste tire fees showed that during the audit period, Daytona Wheels correctly reported the number of tires sold each month on the proper FDOR form (a sales tax form) and remitted in a timely fashion the correct amount of waste tire fees due based on the number of new tires sold and the waste tire fee shown on the return.

4. During the audit period, two waste tire fee amounts were in use. Prior to January 1, 1990, the waste tire fee was 50 cents per tire. After January 1, 1990, the waste tire fee increased to $1.00 per tire.

5. The waste tire fee audit determined that Daytona Wheels accurately reported the number of new tires sold each month on its waste tire return and remitted a waste tire fee equal to the total number of new tires sold. However, FDOR asserts that Daytona Wheels had collected and retained an amount in excess of the statutorily imposed and authorized fee. FDOR's Notice of Proposed Assessment was based upon its determination that in addition to charging the statutory rate of waste tire fee per new tire (e.g. 50 cents or $1.00 in the respective periods of time), the taxpayer also had collected 75 cents or $1.50 per tire without distinguishing on its invoices the state fee from the

additional charges. FDOR's position was that if Daytona Wheels had simply lumped together both fees on the same line of each invoice as part of the same total, the state was entitled to recoup those additional amounts as waste tire fees because all funds lumped together as a waste tire fee were required to be remitted.

6. Effective July 1, 1989, Subsection 403.718(1) was amended by Chapter 89-171, Laws of Florida, to include the requirement that "the fee imposed under this section shall be stated separately on the invoice to the purchaser." This language implicitly requires that the waste tire fee be identified as a state fee on a separate line of each customer's invoice and that the amount of the fee be stated on that line of the invoice. However, during the applicable period, there was no statutory or rule sanction or penalty for non-compliance.

7. During the applicable period there was no rule, guideline, audit standard, audit procedure, or other official policy of FDOR which specifically interpreted the statutory phrase, "stated separately." Determination of compliance with the "stated separately" statutory requirement was based on the discretion of each auditor.

8. However, FDOR has adopted rules based on Section 403.717 and 403.718, Florida Statutes, at Chapter 12A-12, Florida Administrative Code - Solid Waste Fees. Effective January 1, 1989, Rule 12A-12.001(2), Florida Administrative Code provided, in part,

> . . . The fee is imposed upon the dealer selling the tire and not upon the purchaser. However, there is nothing to preclude the dealer from passing the additional cost on to the purchaser by separately stating the fee on the dealer's sales invoice or reflecting the fee in the sales price of the tire . . .

Effective October 16, 1989, pursuant to the statutory amendment, FDOR revised its rule. The revised Rule 12A-12.001(4), stated:

For sales on or after July 1, 1989, the fee is required to be stated separately on the sales invoice or other tangible evidence of sale to the purchaser.

For sales before July 1, 1989, the dealer was free to choose whether to separately state the fee. FDOR did not include in Daytona Wheels' assessment, any fee charged prior to the amendment requiring a separate statement.

9. FDOR did not conduct the new tire fee audit in this case in accordance with any rule, guideline, audit standard, audit procedure, or other official policy of the Department of Environmental Protection f/k/a the Department of Environmental Regulation. Indeed, the environmental agency has not established any rules, guidelines, standards, or procedures for waste tire fee audits.

10. FDOR's auditor, who died before the date of formal hearing and therefore was unable to testify, was presumed by FDOR to have conducted the waste tire fee audit in this case by sampling invoices, matching the invoice amounts to the amounts reflected on the taxpayer's daily sales logs, and matching the daily sales logs to the taxpayer's monthly case summaries. FDOR further presumed that its deceased auditor utilized the amounts reflected on the monthly summaries as the total "new tire fees" collected by Petitioner. There is no suggestion that the deceased auditor reviewed each and every invoice during the audit period.

11. After the issue became disputed, Mr. Marvin Cook, an FDOR auditor with 28 years of general audit experience and with

previous waste tire audit experience, reviewed the previous auditor's work papers. He confirmed the accuracy of the totals in his predecessor's audit work papers by visiting Petitioner's two places of business, where he interviewed Melody Stevens C.P.A., the accountant for Petitioner, and reached an agreement with her as to the records (months) to be used in his review. He examined Petitioner's records, including invoices, daily sales summaries, and monthly summaries of sales from each of Petitioner's two business locations for the agreed sample months.

12. Like his predecessor, Mr. Cook did not examine every sales record of Petitioner, but his review spanned six quarters (six three-month periods) from 1990 to 1992. Within these periods, he randomly chose dates to conduct a detailed examination of daily sales by examining each invoice (sales transaction) for the date(s) selected. These invoices were totaled and verified to the daily sales records. As a result of his examination, Mr. Cook verified, within his education, training and experience, the accuracy of the prior auditor's work.

13. Upon Mr. Cook's evidence and that of Melody Stevens, I find that the Petitioner's daily sales sheets were accurately carried forward to the monthly summaries of sales for the company; that the prior auditor's work papers were accurate as to total sales reported for the monthly sales from each store; and that FDOR's assessment in this case was mathematically accurate in terms of what was presented in the taxpayer's sales records

and FDOR's audit work papers.

14. FDOR's original auditor assessed Petitioner at $32,961.82 in "tax" plus a civil non-fraud penalty of $8,133.43, plus interest of $6,764.53 for a total of $47,859.79 plus interest accruing on the $32,961.82 since February 12, 1993, at the rate of $10.89 per day.

15. After review and negotiation, FDOR sustained the assessment but in its Notice of Decision revised the assessment to reflect $28,095.07 in tax due, penalty of $6,932.57 and interest of $5,765.76 for a total assessment amount of $40,793.40.

16. Mr. Cook's testimony was that the original amount assessed was accurate. Mr. Eckhardt, supervisor for both auditors, testified that he approved the revised amounts.

17. The revised amounts appear to have been in the nature of a negotiated, but unconsummated, "comprise and satisfaction of debt," not "enforceable" in this proceeding. Nonetheless, I accept the other representations of fact arising from this review process that Petitioner's books and records were adequate; Petitioner was entirely cooperative; Petitioner used reasonable care and relied on the advice of a tax adviser; and Petitioner and the industry in general were unaware of the law.

18. Daytona Wheels' salespersons contemporaneously prepared an invoice each time a new tire was sold. The vast majority of the invoices were paid by cash. Invoices were validated by a corresponding transaction on the cash register. At the end of

each day, the totals of the cash register and the cash drawer were reconciled. Then, each invoice was entered into a daily summary record book. At the bottom of each page of the daily summary record book, there is a place for "monthly running total" of the dollar amounts of all tires sold, environmental fee

collected, disposal fee collected, labor costs collected, parts costs collected, and sales tax collected.

19. Consistently during the audit period, Petitioner collected from its customers two fees or charges. It collected the state waste tire fee, imposed by statute, for each new motor vehicle tire sold at retail. This amount was timely remitted to the state on prescribed sales tax forms. Petitioner also simultaneously charged a disposal fee for each used tire removed from a vehicle (in order for the newly purchased tire to be placed on the vehicle) if the used tire was left with Petitioner for disposal.

20. If a customer chose to retain a used tire, Petitioner did not charge a disposal fee. However, if the customer left used tires with Petitioner for disposal, Petitioner charged that customer a disposal fee ($.75 or $1.50) based on the number of used tires left, to defray the amounts a scrap hauler charged Petitioner for disposing of the used tires in an environmentally safe and approved manner.

21. Petitioner's contemporaneously-prepared business records and the testimony of Mr. and Ms. Stevens credibly

establish that Petitioner paid such a disposal fee to a scrap hauler. Petitioner's failure to introduce a Volusia County Ordinance to demonstrate a reason Petitioner was "required to" or would want to pay for environmentally safe disposal of used tires is not controlling.

22. In the course of his review of the prior auditor's work, Mr. Cook did a "judgmental sample" of approximately 35 invoices. He found that the following words or descriptive phrases added to a single line on Petitioner's invoices did not identify the state waste tire fee sufficiently to comply with the "stated separately" requirement: "scrap," "surcharge," "waste tax," "waste charge," "waste," "scrap tire disposal," "environmental/surcharge," and "scrap tire removal." He considered a blank space also to be insufficient disclosure. Mr. Cook's sample indicated that 30.24% of the 35 invoices he reviewed for the months selected charged a single, commingled total on the invoices labeled as "waste tax."

23. All concerned acknowledge that Mr. Cook's judgmental sample did not accurately reflect the entire universe of invoices for the audit period.

24. The auditor who prepared the assessment initially and Mr. Cook considered all of the monies collected by Petitioner under the separate line item on its invoice (regardless of what was specifically stated on the invoice and regardless of what words or phrase were utilized in describing the state waste tire fee) as constituting a consistent overcharge of the state waste

tire fee, because Petitioner had lumped together in one total, on a single line, the statutory waste tire fee with an additional undisclosed charge.

25. Melody Stevens, Petitioner's accountant, reviewed 16,600 invoices applicable to the audit period. She conceded that some invoices were missing. However, the total discrepancy in dollar amount was under $6,000. This means that very, very few invoices proportionate to the universe of invoices for the audit period were missing from Ms. Stevens's review. Her review constitutes a much larger sample than that conducted by Mr. Cook, and accordingly, her review of the actual language used on almost the whole of the universe of invoices for the audit period is deemed to be more accurate than any other sample.

26. Ms. Stevens' review determined that Petitioner used 17 different words or descriptive phrases in its attempt to identify on its invoices either the state imposed waste tire fee for new tires, or its own disposal fee for used tires, or a combination of the two fees. These words or descriptive phrases and the frequency of their use in the 16,600 invoices examined are summarized as follows: (1) blank line, 238 invoices; (2) "state fee" 5 invoices; (3) "environmental," 75 invoices; (4) "ENV fee," 41 invoices; (5) "disposal tax/waste tax" 6,662 invoices; (6) "waste fee or disposal fee," 417 invoices; (7) "waste charge," 163 invoices; (8) "waste," 2,598 invoices; (9) "surcharge," 3,868 invoices, (10) "scrap tire removal", 2 invoices; (11) "scrap tire disposal," 16 invoices; (12)

"scrap," 12 invoices; (13) "environmental/tire waste fee" (pre-printed) 361 invoices; (14) "tire waste fee" (pre-printed), 1,735 invoices; (15) "disposal," 301 invoices; (16) "waste tax," included in (5) above; (17) "disposal fee," included in (6) above; and (18) "waste/disposal," 112 invoices.

27. At no time were the terms "waste tire fee," "new tire fee," or "used tire fee" used on Petitioner's invoices to refer to the state new tire fee, but also at no time was the state-required fee distinguished from the local scrap hauler's fee.

28. During the audit period, Stephen J. Brown was a customer of Petitioner's Daytona Mall location. When he bought new tires there, he observed that the invoice presented to him charged more than the $1.00 per tire state fee. He complained to the manager that he was being overcharged for the state fee. The manager made no oral distinction between any state and local fee but told him he had to pay the total line item charge.
Mr. Brown, who was also an FDOR auditor, suggested that Petitioner be audited, and the audit in this case resulted. Upon the credible evidence as a whole, I am unable to find that Petitioner posted a separate notice enumerating both fees during the audit period, but I find that such a notice was posted at some time after the audit period.

29. Mr. Stevens, Petitioner's owner testified credibly that some retailers confused the waste tire fee issue by charging a single price for four new tires, which included all taxes, fees, and charges. FDOR witnesses supported Mr. Stevens further

testimony that many tire retailers were unaware of the requirement to state the waste tire fee separately or were confused by it.

30. Petitioner attempted in good faith to comply with the law during the audit period, and after the audit period it even posted signs. Petitioner did not inflate the amount collected as a state fee for direct profit. Petitioner's additional charges were solely to cover and pass-on its used tire disposal costs, a legitimate cost-of-doing-business, so as to indirectly achieve a profit.

CONCLUSIONS OF LAW

31. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause, pursuant to Section 120.57(1), Florida Statutes.

32. The facts are largely undisputed. No part of FDOR's bill to Petitioner relates to the taxpayer's failure to timely remit the state's waste tire fee or state sales tax. The assessment herein seeks only to collect the money Petitioner received from consumers in excess of the remitted state waste tire fee on the basis that Petitioner lumped together on a single line with the state waste tire fee the amount the taxpayer charged as a "pass-through" of $.75 - $1.50 per tire to pay a scrap hauler to dispose-of the used tires removed to make way for the newly-purchased tires, without a notation distinguishing the two amounts from each other as required by a July 1, 1989 amendment to Section 403.718(1), Florida Statutes, providing

that, "The fee imposed under this section (the waste tire fee) shall be stated separately on the invoice to the purchaser."

33. FDOR's assessment and legal analysis of state entitlement to all amounts collected on the single line, also applies Section 213.756, Florida Statutes, which provides as follows:

> Funds collected from a purchaser under the representation that they are taxes provided for under the state revenue laws are state funds from the moment of collection and are not subject to refund absent proof that such funds have been refunded previously to the purchaser.

34. The other statutes pertinent to this case are Sections 403.717 and 403.718, Florida Statutes, cited here as they appeared prior to July 1, 1989's "line item" amendment:

> Subsection 403.717, Waste tire requirements.
> (1) For purposes of this section and ss. 403.718 and 403.719 . . . .
> (a) 'Department' means the Department of Environmental Regulation.
>
> * * *
>
> (d) 'Waste tire' means a whole tire that is no longer suitable for its original intended purpose because of wear, damage, or defect.
>
> * * *
>
> (4) By January 1, 1989, the department shall adopt rules to carry out the provisions of this section and ss. 403.718 and 403.719. Such rules shall:
>
> (a) Provide for the administration of a waste tire processing facility permit, which may not exceed $250 annually;
> (b) Provide for the administration of waste tire collector and collection center permits, which may not exceed $250 annually;
> (c) Set standards for waste tire processing facilities and associated waste tire sites,

waste tire collection centers, and waste tire collectors;
(d) Establish procedures for administering the waste tire grants program and issuing grants;
(e) Authorize the final disposal of waste tires at a permitted solid waste disposal facility provided the tires have been cut into sufficiently small parts to assure their proper disposal; and
(f) Allow waste tire material which has been cut into sufficiently small parts to be used as daily cover material for a landfill.

* * *

Subsection 403.718 Waste tire fees--

(1) For the privilege of engaging in business, a fee for each new motor vehicle tire sold at retail is imposed on any person engaging the business of making retail sales of new motor vehicle tires within this state. For the period January 1, 1989, through December 31, 1989, such fee shall be imposed at the rate of 50 cents for each new tire sold. Beginning January 1, 1990, and thereafter, such fee shall be imposed at the rate of $1 for each new tire sold. The fee imposed shall be paid to the Department of Revenue on or before the 20th day of the month following the calendar quarter in which the sale occurs. The terms 'sold at retail' and 'retail sales' do not include the sale of new motor vehicle tires to a person solely for the purpose of resale provided the subsequent retail sale in this state is subject to the fee. The fee does not apply to recapped tires. Such fee shall be subject to general sales tax pursuant to s. 212.05. The provisions of s. 212.07(4) shall not apply to the provisions of this section.

(2) The fee imposed by this section shall be reported to the Department of Revenue. The payment shall be accompanied by such form as the Department of Revenue may prescribe. The proceeds of the new tire fee, less administrative costs, shall be transferred by the Department of Revenue into the waste tire account within the Solid Waste Management Trust Fund. For the purposes of this section, 'proceeds' of the fee shall mean all

> funds collected and received by the department hereunder, including interest and penalties on delinquent fees. The amount deducted for the costs of administration shall not exceed 3 percent of the total revenues collected hereunder and shall be only those costs solely and directly attributed to the fee.
>
> (3)(a) The Department of Revenue shall administer, collect and enforce the fee authorized under this section pursuant to the same procedures used in the administration, collection, and enforcement of the general state sales tax imposed under chapter 212, except as provided in this section. The provisions of this section regarding the authority to audit and make assessments, keeping of books and records, and interest and penalties on delinquent fees shall apply. The fee shall not be included in the computation of estimated taxes pursuant to s. 212.11(1)(a) nor shall the dealer's credit for collecting taxes or fees in s. 212.12 apply to this fee.
> (b) The Department of Revenue, under the applicable rules of the Career Service Commission, is authorized to employ persons and incur other expenses for which funds are appropriated by the Legislature. The department is empowered to adopt such rules and shall prescribe and publish such forms as may be necessary to effectuate the purposes of this section. The department is authorized to establish audit procedures and to assess delinquent fees.

35. The taxpayer contends first, that FDOR has not made out a prima facie case of taxes due if Section 213.756, Florida Statutes, is not applicable. Petitioner further asserts that Section 213.756 is inapplicable because the state waste tire fee constitutes "neither a tax nor an imposition under the 'revenue laws' of Florida," and because the proof of assessment accuracy is flawed.

36. Ignoring for a moment Petitioner's confusion over the

springing burdens of proof in revenue cases, I reject the latter contention upon the facts as found, supra. Neither party contends that the sales tax provisions specifically excluded by Chapter 403 have been applied. The assessment is mathematically acceptable and complies with Florida revenue laws generally and applies Chapter 12A-12, Florida Administrative Code, specifically.

37. As to whether or not Florida's "revenue laws" apply, the Florida Supreme Court has long defined a tax as:

> an enforced burden of contribution imposed by sovereign right for the support of government, the administration of the law, and to execute the various functions the sovereign is called on to perform.

Klemm v. Davenport, 100 Fla. 627, 129 So. 904, 907 (Fla. 1930). See also Coy v. Florida Birth-Related Neurological Injury Compensation Plan, 595 So. 2d 943, 945 (Fla. 1992); City of Orlando v. State, 67 So. 2d 673, 674 (Fla. 1953). If the effect of the legislation is to raise revenue, it is a general tax no matter what name it is given. Cf., American Can Co. v. City of Tampa, 152 Fla. 798, 14 So. 2d 203, 210 (Fla. 1943). Florida law recognizes that a true fee, imposed as part of a regulatory process, has to be directly related to the actual costs of the regulatory process or the services rendered. See Finlayson v. Conner, 167 So. 2d 569, 573 (Fla. 1964). The waste tire fee is, in actuality, a "tax," because the amount collected from the tire purchaser has no relationship to any regulation of tires. Additionally, since the purpose of the fee is to raise revenue

for the disposal of tires, the raising of revenue makes the fee, a "tax." Therefore, Section 213.756, Florida Statutes, may be applied.

38. The foregoing conclusions implicitly deny Petitioner's renewed Motion for Summary Recommended Order.

39. Secondly, Petitioner contends that FDOR lacked authority to make the assessment and to impose penalties because if Sections 403.717(4) and 403.718(3)(a) are read together, only the environmental agency (not FDOR) is authorized to establish audit procedures, and since the environmental agency has not established such audit procedures, FDOR has no authority to assess waste tire fees, civil penalties, or delinquent tire fees.

40. Chapter 89-171, Laws of Florida, Section 14, permitting FDOR "to enact emergency rules for purposes of implementing the applicable provisions of this act," together with unchallenged Chapter 12A-12, Florida Administrative Code, is enough reason to reject Petitioner's second argument. (Sections 7 and 8 of that Chapter also amended the waste tire fee provisions, specifically). However, I also reject Petitioner's construction of the statute for the following reasons.

41. Subsection 403.717(1)(a), Florida Statutes, specifies that "Department" shall refer to the environmental agency when that word is used in Subsections 403.717, 403.718 and 403.719, Florida Statutes, but Subsections (4)(a-f), Florida Statutes, are very explicit about which types of rules the environmental agency may promulgate. All of these subsections relate to environmental

permitting expertise. None of these subsections relate to waste tire fee administration, collection or enforcement procedures, authority for which devolves upon the Department of Revenue by equally specific language in Section 403.718, particularly Subsection (3).

42. A statute will ordinarily be construed, under the doctrine of expressio unius est exclusio alterius, as excluding from its operation all things not expressly mentioned, where the statute enumerates things on which it is to operate. DeSisto College, Inc. v. Town of Howey-in-the-Hills, 706 F.Supp. 1479 (M.D. Fla. 1989), affirmed 888 F.2d 766 (11th Cir. Fla. 1989). Indeed, the type of specificity for the environmental agency rules set out in Subsections 403.717(4)(a-f), is precisely the type of limited rule-making grant now contemplated by 1996's "New APA," Chapter 120, Florida Statutes. Under the doctrine of inclusio unius est exclusio alterius, when a law expressly describes a particular situation in which something should apply, an inference can be drawn that what is not included by specific reference was intended to be omitted or excluded. Gay v. Singletary, 700 So. 2d 1220 (Fla. 1997). Further, when general language is limited by subsequent specific language, the Legislature is presumed to have intended its specific afterthought.

43. Subsections 403.718(1), (2) and (3), clearly are concerned with FDOR's exclusive authority to "administer, collect, and enforce" the waste tire fee and FDOR's exclusive

authority to place the ultimate proceeds (defined as all funds collected and received) into the environmental agency's Solid Waste Management Trust Fund. Section 403.718(2) also specifically provides that the taxpayer's fee payment shall be accompanied by such form as FDOR, not the environmental agency, may prescribe. Pursuant to Subsection 403.718(3)(a), FDOR is clearly charged to "administer, collect, and enforce" the waste tire fee using the "same procedures used in the administration, collection, and enforcement of the general state sales tax imposed under Chapter 212, except as provided in this section." The provisions of this section regarding the authority to audit and make assessments, keeping of books and records, and interest and penalties on delinquent fees shall apply." Reading the entire statute in context, "general state sales tax procedures" logically includes Chapter 213, Florida Statutes, and FDOR's rules for audits and assessments.

44. Then Subsection 403.718(3)(b), Florida Statutes, goes on to specify:

> The Department of Revenue, under the applicable rules of the Career Service Commission, is authorized to employ persons and incur other expenses for which funds are appropriated by the Legislature. The department is empowered to adopt such rules and shall prescribe and publish such forms as may be necessary to effectuate the purposes of this section. The department is authorized to establish audit procedures and to assess delinquent fees. (Emphasis supplied)

Read in context for obvious intent of the drafters, or in para materia with Subsection 403.718(2), clearly specifying the use of

FDOR reporting and remittance forms, it appears that audits and assessments of waste tire fees by FDOR within its own statutes and rules is affirmatively authorized, or at least is acceptable in the absence of any contrary rules enacted by the environmental agency.

45. FDOR's promulgation of Chapter 12A-12, Florida Administrative Code, providing forms and requirements for waste tire fees, and the environmental agency's forbearance in not enacting any rules concerning such audit procedures and assessment of delinquent fees express each agency's understanding of their respective authority and roles under Chapter 403, Florida Statutes. The agencies' mutual construction of "their" statute is entitled to great weight. Dept. of Revenue v. First Florida Nat. Bank of Florida, 513 So. 2d 114 (Fla. 1987), appeal dismissed 108 S. Ct. 253, 485 U.S. 949, 99 L.Ed. 408 (1988).

46. It is essential that statutes be construed in context, and not piecemeal. Chrysler Plymouth Jeep Eagle, Inc. v. Chrysler Corp., 898 F.Supp. 858 (M.D. Fla. 1995). All parts of a statute must be read together in order to achieve a consistent whole, read to give meaning to all the statute's constituent subparts, and read harmoniously so as to give effect to each section. Tefel v. Reno, 972 F.Supp. 623 (S.D. Fla. 1997), T.R. v. State, 677 So. 2d 270 (Fla. 1996); Reyf v. Reyf, 620 So. 2d 218 (Fla. 3d DCA 1993); Forsythe v. Longboat Key Beach Erosion Control District, 604 So. 2d 452 (Fla. 1992). Under the doctrine of noscitur a sociis, words take meaning based on their context

or their association with other words in the same statute. Desisto College, Inc. v. Town of Howey-in-the-Hills, supra. A statute should be construed so as to suppress the mischief and advance the remedy (intended by the legislature) and to suppress subtle inventions and evasions for continuance of the mischief. U.S. v. Second National Bank of North Miami, 502 F.2d 535 (5th Cir. 1974). cert den. 95 S.Ct. 1567, 421 U.S. 912, 43 L.Ed. 2d 777 (1975); Miller v. Lykes Bros. v. S.S. Co., Inc., 467 F.2d 464 (5th Cir. 1972). Placing audits and assessments for waste tire fees under the Respondent FDOR was the clear intent of the statute.

47. Thirdly, Petitioner contends that FDOR cannot legitimately apply Section 213.756, Florida Statutes, to new tire fees, because it is a "state revenue law" which applies only to taxes imposed under the revenue laws covered in Chapters 192-221, Florida Statutes, and because none of its 16,600 invoices either clearly represented that the new tire fee was a tax provided for under the state revenue laws or mislead consumers into believing they were required by state law to pay the combined fees. Fourthly, Petitioner asserts that because Petitioner failed to comply with the Section 403.718(1) requirement to "state separately," Petitioner also has not represented that the $.75 - $1.50 disposal fee for used tire disposal was imposed under Section 403.718.

48. As previously discussed, Section 213.756, Florida Statutes, may be applied because the waste tire fee is a "tax."

However, Petitioner's third and fourth defenses raise a significant issue as to how that statute is to be applied.

49. Section 403.718(1), imposes the waste tire fee on the retailer "for the privilege of engaging in business," but permits and provides for the method by which the retailer can pass the fee on to the new tire purchaser (consumer). The purpose of the single line disclosure requirement is to advise the new tire purchaser of the governmental purpose he is paying for and that the retailer is passing on that fee to the consumer. The separate line also serves the public purposes of not permitting retailers to inflate the state fee for a fraudulent direct profit or pass on other charges (such as a hauling and disposal fee) disguised as the state-imposed fee/tax. While the statute does not prohibit the retailer passing on costs or fees such as the hauling and disposal fee here, the statute's "separate line" provision's main thrust is to inhibit misleading the consumer. A consumer may not resist paying what is represented as a state-imposed fee or tax on new tires, but he may elect to dispose of his own used tires if he knows a retailer is passing on another, private fee.[1] A side-effect is that the "separate line" provision makes audits easier for the agency.

50. Admittedly, the statute provides no penalty or sanction for a retailer's failure to "line item." However, it follows from the foregoing conclusion that in order to address any amount "overcollected" by the retailer, FDOR must not just establish that the retailer "overcollected" but that he overcollected by

somehow representing that the amount he was collecting was, in fact, the state-imposed waste tire fee. This concept is enunciated best in Section 213.756, relied upon by FDOR, because that statute states that only "funds collected from a purchaser under the representation that they are taxes provided for under the state revenue laws" become state funds by virtue of a misleading representation, collection, and commingling.

51. Mr. Cook, the review auditor, only examined 35 out of over 16,600 invoices and came up with 30.24 percent labeled as "waste tax." Both he and his superior, Mr. Eckhardt conceded that there was nothing to suggest that this percentage carried over to invoices he did not see. Therefore, Ms. Stevens' extensive review of all 16,600 invoices is more reliable and more representative.

52. The problem with commingling of funds is that, once commingled, they are indistinguishable. The method this retailer taxpayer chose to use to notify consumers did not distinguish the state waste tire fee or the retailer's used tire disposal fee. The method this retailer used to notify consumers that it was collecting both a state tax and a cost-of-doing business expense did not clearly distinguish the tax. Reasonable consumers could not have determined they were being charged two separate fees, with two different motivations, purposes, and destinations, from any of Petitioner's single line totals, blank or otherwise. Use of the terms, "state fee," "disposal tax/waste tax," "waste fee or disposal fee," "waste charge," "surcharge,"

"environmental/tire waste fee," "tire waste fee," "waste tax" and "disposal fee," are clearly commingling and actively suggest a taxation imprimitur. The remaining categories misrepresent passively or merely by failure to inform. In addition, the testimony of Mr. Brown suggests that customers who questioned the

confusing line item charge were misled by uninformed or confused sales personnel.

53. The purposes of the statute would be circumvented if Petitioner prevailed herein. Petitioner's prevailing would encourage other retailers in the mischief Section 403.718(1) was designed to prevent. While I conclude that there was no active criminal fraud in Petitioner's dealings either with consumers or FDOR, I also conclude that Petitioner's local used tire disposal fees were collected from consumers under color of a required state tax, and therefore, Petitioner may not retain them. See Blackshears II Aluminum, Inc. v. Department of Revenue, 641 So. 2d 928 (Fla. 5th DCA 1994), holding that it is appropriate to discourage fraudulent collection of bogus taxes by sale tax licensees, who have little to lose by retaining the wrongful collection and using them for their own purposes.

54. Based on the cooperation of Petitioner throughout the audit process, the absence of any criminal intent or direct profit motive, and the fact that this is a case of first impression which presented valid and complex legal issues for determination, I also conclude that FDOR should waive all

penalties and, for the reasons cited in its own Notice of Decision, assesses only the revised amount, plus interest.

RECOMMENDATION

Upon the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that the Florida Department of Revenue enter a Final Order validating the original assessment in every respect,

assessing the revised amount of $28,095.07 plus accruing interest and waiving all penalties.

DONE AND ENTERED this 14th day of December, 1998, in Tallahassee, Leon County, Florida.

____

ELLA JANE P. DAVIS
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847

Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of December, 1998.

ENDNOTE

[1]/ The separate line provision certainly would have competitive consumer choice implications for the "one inclusive for 4 tire" scenario described by Mr. Stevens.

COPIES FURNISHED:

Edgar M. Dunn, Jr., Esquire
Post Office Drawer 2600

Daytona Beach, Florida 32115-2600

James McAuley, Esquire
Scott M. Covell, Esquire
Department of Legal Affairs
The Capitol, Tax Section
Tallahassee, Florida 32399-1050

Linda Lettera, Esquire
Department of Revenue
Post Office Box 6668
Tallahassee, Florida 32314-6668

Larry Fuchs, Executive Director
Department of Revenue
104 Carlton Building
Tallahassee, Florida 32399-0100

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.