STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RATHON CORPORATION, f/k/a DIVERSEY CORPORATION,	)	
Petitioner,	)	
vs.	)	Case No. 97-5908RX
STATE OF FLORIDA, DEPARTMENT OF REVENUE,	)	
Respondent.	)	

FINAL ORDER

Notice was provided and on February 26, 1998, a formal hearing was held in this case. Authority for conducting the hearing is set forth in Sections 120.569(1), Florida Statutes, 120.57(1), Florida Statutes. The hearing location was the DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida. The hearing was conducted by Charles C. Adams, Administrative Law Judge.

APPEARANCES

For Petitioner: H. Michael Madsen, Esquire
Vickers, Madsen and Goldman, LLP
Suite 100
1505 Metropolitan Boulevard
Tallahassee, Florida 32308-3765

For Respondent: John N. Upchurch, Esquire
James McCauley, Esquire
Department of Legal Affairs
The Capitol, Tax Section
Tallahassee, Florida 32399-1050

STATEMENT OF THE ISSUE

Does Petitioner have standing to challenge Rule 12A-1.091(3), Florida Administrative Code? If Petitioner has standing, is Rule 12A-1.091(3), Florida Administrative Code, an invalid exercise of delegated legislative authority? See Section 120.56, Florida Statutes.

PRELIMINARY STATEMENT

On August 8, 1996, Petitioner made application to Respondent for a refund of use taxes for the period July 1993 through March 1995. On December 12, 1996, that refund request was denied through a Notice of Proposed Refund Denial For the Refund Claim. That preliminary decision was contested through a protest letter from Petitioner dated January 14,1997. The protest letter was responded to by the Respondent by the issuance of a Notice of Decision of Refund Denial dated July 16, 1997. On September 5, 1997, Petitioner contested the Respondent's decision to deny the refund request by petitioning for a Chapter 120, Florida Statutes, administrative hearing. On September 22, 1997, the case was received by the Division of Administrative Hearings upon the request by the Respondent to conduct an administrative hearing.

The case was scheduled to be heard on January 8, 1998. The case was re-scheduled and heard on February 26, 1998.

On December 15, 1997, Petitioner filed a challenge pursuant to Section 120.56, Florida Statutes, calling for the invalidation

of Rule 12A-1.091(3), Florida Administrative Code. That case was assigned as DOAH Case No. 97-5908RX. On December 23, 1997, DOAH Case Nos. 97-4429 and 97-5908RX, were consolidated for purposes of hearing and the consolidated cases were subsequently noticed to be heard on February 26, 1998.

On December 19, 1997, an order was entered which accepted the Petitioner's Amended Petition in DOAH Case No. 97-4429.

On February 24, 1998, the Petitioner was allowed to amend its Petition in DOAH Case No. 97-5908RX to add paragraph 13a.

Respondent had moved for Summary Final Order directed to DOAH Case No. 97-5908RX. The motion challenged the Petitioner's standing to contest the validity of Rule 12A-1.091(3), Florida Administrative Code, among other grounds supporting the Motion for Summary Final Order. No decision was made concerning the Motion for Summary Final Order prior to the conduct of the consolidated hearing. Ruling was reserved on the matters set forth in the Motion for Summary Final Order pending entry of a Final Order at the conclusion of the consolidated hearing. The Final Order in DOAH Case No. 97-5908RX has been entered separate from the Recommended Order in DOAH Case No. 97-4429.

At hearing Petitioner presented David Van Maele as its witness. Petitioner's Exhibits one through ten were admitted. Petitioner's post-hearing Exhibit eleven is admitted. The deposition of Milton Harris McKown was also admitted. At hearing Respondent presented Linda Bridges as its witness.

Upon Petitioner's request, these portions of the California Revenue and Taxation Code, were officially recognized:

a. Excerpts from a Table of Contents;
b. Chapter One, Sections 6001 through 6024, General Provisions and Definitions; and
c. Chapter 3, Section 6201 through 6207, the Use Tax.

On March 6, 1998, a hearing transcript for the consolidated hearing was filed. On March 20, 1998, the parties filed proposed recommended and final orders directed to the consolidated cases. Those proposals have been considered in the preparation of the Recommended Order in DOAH Case No. 97-4429, and the Final Order in DOAH Case No. 97-5908RX.

FINDINGS OF FACT

1. Rathon Corporation, formerly known as Diversey Corporation, is a Delaware Corporation authorized to do business in Florida. It manufactures various detergents, cleaners, and soaps, and the equipment to dispense those products. The products are marketed in Florida and other states. The customers of the products include hotels, hospitals, factories, and restaurants. The devices that dispense the detergents, cleaners, and soaps are referred to as "feeders." Those feeders can range from simple hand soap dispensers to electronically regulated machines that inject soap into commercial dishwashers. The feeders are loaned to Petitioner's customers at no additional charge for the period of time that the customer continues to purchase the product(s) dispensed by the feeder. These

circumstances existed in the period of July 1993 through March 1995.

2. In the period of July 1993 through March 1995, Diversey Corporation, now Rathon Corporation, paid the State of Florida $58,969.22 in use tax associated with the feeders.

3. During the period in question, the Petitioner manufactured the feeders at a facility in Santa Cruz, California. The feeders were not warehoused in the Santa Cruz facility for an extended period. They were prepared for shipment and shipped to customers in the various states, to include Florida and California customers, to be used in the places of business operated by the customers. The feeders being shipped were not packaged with other products.

4. During the period July 1993 through March 1995, the Petitioner not only paid use tax to Florida for the feeders, it paid use tax in forty-four other states and the District of Columbia, based upon the costs of manufacturing the feeders. California was among the other forty-four states.

5. During the period in question, Petitioner accrued and paid use taxes to Florida and California limited to the feeders used by customers in those states, based upon the product sales allocation method it used in relation to the forty-three other states and the District of Columbia.

6. The feeders that were provided to Florida customers were shipped by common carrier. Upon their arrival in Florida no tax

had been paid to California pertaining to those feeders. When the feeders arrived in Florida during the period at issue, use tax would be remitted to Florida. Subsequently, the Petitioner paid the State of California a use tax associated with the feeders that had been shipped to Florida customers and upon which a use tax had been imposed by the State of Florida and paid. The California payment is described in detail below.

7. Petitioner had paid Florida use tax on the feeders shipped to Florida customers based on the total manufactured cost of the feeders to Petitioner, including materials, labor, and overhead. The additional use tax paid to California for those feeders was based only on the cost of materials.

8. The overall costs of feeders allocated to Florida for the refund period was $982,803.00. Petitioner remitted a 6% use tax to Florida totaling $58,969.22 for the period in question.

9. In 1996, Petitioner was audited for sales and use tax compliance by the State of California. That audit process included the refund period that is in question in this case, July 1993 through March 1995. Following the audit, the State of California issued a Notice of Determination asserting additional liability for tax and interest that totaled $355,753.95. Petitioner paid that assessment.

10. The California auditor had arrived at the assessment by concluding that Petitioner owed California for 44.57% of all feeders manufactured at Petitioner's Santa Cruz facility. The

44.57% represented all newly manufactured feeders that had been loaned by Petitioner to its customers during the refund period over the entire United States. As a consequence, the assessment of use tax by the State of California included tax on feeders for which Petitioner had paid Florida $58,969.22 in use tax prior to the California assessment of $355,753.95. Petitioner did not apply for credit in California for the portion of the $355,753.95 that would relate to the feeders brought to Florida during the period in question. Petitioner took no action to obtain a credit on the amount paid to Florida as a means to reduce the California tax obligation pursuant to the 1996 audit, because Petitioner had been told that the use tax for the feeders used by Florida customers was legally due in California and not in Florida.

11. In arriving at the determination that 44.57% of the feeders manufactured during the period in question had been loaned to customers within the continental United States, the California auditor took into account that 21.8% of the feeders and feeder parts were sold for export, leaving 78.2% to be used in the United States. Of the 78.2% remaining for the United States, 57% were complete feeders sent to customers within the United States, and 43% were repair parts that were sent to Petitioner's Cambridge Division in Maryland, where those repair parts were being stored for future use. The percentage of 44.57% was arrived at by multiplying 57% times 78.2%, representing the percent of total feeders manufactured for use in the United

States that were sent to customers within the United States and not held in inventory as repair parts.

12. Again, California based its use tax for tangible personal property manufactured in that state to include only the cost of materials. Consequently, when the California auditor computed use tax to be collected by California using the 44.57% of total feeders manufactured to be used in the United States by Petitioner's customers in the United States, the California auditor used a cost factor of 55% of overall costs which was attributable to the cost of materials only.

13. The total cost of feeders manufactured by Petitioner in California during the period in question, as related in the California tax audit, was $19,028,714.00. The total cost manufactured for use in the United States was $8,481,098.00, representing 44.57% of the overall cost of manufacturing. When the $8,481.098.00 is multiplied by 55%, representing the cost of materials only, the total costs of the goods subject to the use tax for the period in question is $4,664,604.00. A use tax rate of 7% was applied against the amount of $4,664,604.00.

14. To attribute the portion of use tax paid to California following the 1996 audit associated with feeders that had been sent to Florida during the period in question, the answer is derived by multiplying $982,803.00 by 55% for a total of $540,542.00, and in turn multiplying that amount by 7%, the rate of tax imposed by California. That total is $37,837.91 in use

tax that was subsequently paid to California after $58,962.22 had been paid to Florida for use tax on the same feeders.

15. Diversey Corporation sought a tax refund in the amount of $58,977.00, through an application dated August 8, 1996, in relation to the period July 1993 through March. Eventually through the decision by the Respondent in its Notice of Decision of Refund Denial dated July 16, 1997, Respondent refused to grant the refund of $58,977.00. At present, Petitioner requests that it be given a refund of $37,837.91, which represents the portion of use tax paid to Florida that has been duplicated in a payment of use tax to California.

16. Respondent, in its Notice of Decision of Refund Denial entered on July 16, 1997, and based upon the facts adduced at the final hearing, premises its proposed agency action denying the refund request upon the language set for in Section 212.06(1)(a) and (7), Florida Statutes. The determination to deny the refund request was not based upon reliance on Rule 12A-1.091(3), Florida Administrative Code. The theory for denying the refund is premised upon Respondent's argument that use tax was due to Florida, "as of the moment" feeders arrived in Florida for use in Petitioner's business operations associated with its customers. Petitioner then paid the use tax to Florida at the time the feeders arrived in Florida. Having not paid California Use Tax prior to paying Florida Use Tax, Respondent concludes, through

its proposed agency action, that it need not refund to Petitioner the use taxes it paid to California at a later date.

17. Petitioner had referred to Rule 12A-1.091, Florida Administrative Code, following receipt of the Notice of Proposed Refund Denial issued on December 9, 1996, possibly creating the impression that Petitioner believed that Rule 12A-1.091, Florida Administrative Code, would support its claim for refund. It later developed that Petitioner did not have in mind reliance upon Rule 12A-1.091, Florida Administrative Code, to support its claim for refund. Instead, Petitioner made reference to that rule and specifically Rule 12A-1.091(3), Florida Administrative Code, as a means to perfect a challenge to Rule 12A-1.091(3), Florida Administrative Code, filed with the Division of Administrative Hearings on December 15, 1997, claiming that the challenged rule was an invalid exercise of authority. That challenge was assigned DOAH Case No. 97-5908RX.

18. In summary, notwithstanding Petitioner's argument to the contrary, Respondent has never relied upon Rule 12A-1.091(3), Florida Administrative Code, or any other part of that rule in its proposed agency action denying the refund request. Absent Petitioner's affirmative reliance upon Rule 12A-1.091(3), Florida Administrative Code, the rule has no part to play in resolving this dispute.

CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction of the subject matter and the parties to this action in accordance with Sections 120.56, 120.569(1), and 120.57(1), Florida Statutes.

20. Petitioner sought repayment of funds paid into the State Treasury for use taxes for the period of July 1993 through March 1995. See Section 215.26(1), Florida Statutes. Respondent, in defending its decision to deny the repayment, has consistently relied upon provisions within Chapter 212, Florida Statutes, as well as the language within Section 215.26(1), Florida Statutes. In particular, Respondent has relied upon the language at Section 212.06(7), Florida Statutes, in defending its proposed agency action. Petitioner did not look to the provisions of Rule 12A-1.091(3), Florida Administrative Code, to assist the Petitioner in its refund claim. Instead, Petitioner claims that an inference has been created that Respondent utilized Rule 12A-1.091(3), Florida Administrative Code, to determine the refund question adverse to the interest of Petitioner. Petitioner believes this creates the opportunity to challenge the rule. Given that Respondent did not rely upon Rule 12A-1.091(3), Florida Administrative Code, to defend against the Request for Repayment of Funds, Petitioner is not substantially affected by the rule and is not entitled to seek an administrative determination of the invalidity of the rule.

Upon consideration, it is

ORDERED:

That Petitioner's challenge to the validity of Rule 12A-1.091(3), Florida Administrative Code, is DISMISSED.[1]

DONE AND ORDERED this 20th day of April, 1998, in Tallahassee, Leon County, Florida.

CHARLES C. ADAMS
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 20th day of April, 1998.

ENDNOTE

1/ Copies of the exhibits entered in the consolidated hearing for DOAH Case No. 97-4429 and DOAH Case No. 97-5908RX, are maintained as part of the file for DOAH Case No. 97-5908RX. The originals of those exhibits and hearing transcript have been transmitted to the Department of Revenue in relation to DOAH Case No. 97-4429.

COPIES FURNISHED:

H. Michael Madsen, Esquire
Vickers, Madsen,
and Goldman, LLP
Suite 101
1705 Metropolitan Boulevard
Tallahassee, Florida 32308-3765

John N. Upchurch, Esquire
Department of Legal Affairs
The Capitol, Tax Section
Tallahassee, Florida 32399-1050

Linda Lettera, Esquire
Department of Revenue
204 Carlton Building
Tallahassee, Florida 32399-0100

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

Carroll Webb, Executive Director
Administrative Procedure Committee
120 Holland Building
Tallahassee, Florida 32399-1300

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 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.