STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LOUIS DREYFUS CITRUS, INC.; TAMPA JUICE SERVICE, INC.; PASCO BEVERAGE COMPANY; and JUICE SOURCE, L.L.C.,	)	
Petitioners,	)	
and	)	
COUNTRY PURE FOODS, INC.,	)	
Intervenor,	)	
vs.	)	Case No. 03-0595RP
DEPARTMENT OF CITRUS,	)	
Respondent.	)	

FINAL ORDER

By Order dated March 10, 2003, Lawrence P. Stevenson, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, granted the parties' joint stipulation that no formal hearing was necessary in this case. In lieu of a hearing, the parties stipulated that the record in this case would consist of the record in DOAH Case No. 02-4607RP, supplemented by two filings by Petitioners and memoranda of law by all parties.

APPEARANCES

For Petitioners and Intervenor:

Kristen C. Gunter, Esquire
Macfarlane Ferguson & McMullen
1501 South Florida Avenue
Lakeland, Florida 33803

For Respondent: Ken Keck, Esquire
Department of Citrus
Post Office Box 148
Lakeland, Florida 33802-0148

Hank Campbell, Esquire
Post Office Box 3
Lakeland, Florida 33801-0003

Eric J. Taylor, Esquire
Attorney General's Office
Tax Section
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

STATEMENT OF THE ISSUE

The issue presented for decision is whether Proposed Rules 20-15.001, 20-15.002, and 20-15.003 constitute an invalid exercise of delegated legislative authority pursuant to Section 120.52(8)(a)-(e), Florida Statutes.

PRELIMINARY STATEMENT

The Department of Citrus (the "Department") published Proposed Rules 20-15.001, 20-15.002, and 20-15.003, Florida Administrative Code (the "Proposed Rules"), in the November 15, 2002, edition of the Florida Administrative Weekly (vol. 28, no. 46, pp. 4996-4998). The Proposed Rules were challenged in Peace River Citrus Products, Inc., et al., vs. Department of

Citrus, DOAH Case No. 02-4607RP ("Peace River"). That case was consolidated with DOAH Case No. 02-3648RE, a challenge to Emergency Rules 20ER02-01, 20ER02-02, and 20ER02-03, which were identical to the Proposed Rules. On January 24, 2003, a Final Order was entered holding that the Emergency Rules constituted an invalid exercise of delegated legislative authority, and that the Proposed Rules did not constitute an invalid exercise of delegated legislative authority. That Final Order is currently on appeal at the Second District Court of Appeal.

On February 19, 2003, the Department amended the Proposed Rules. These amendments were published in the March 7, 2003, edition of the Florida Administrative Weekly (vol. 29, no. 10, p. 1036).

On February 24, 2003, Petitioners in the instant case filed a Petition for Administrative Determination of the Invalidity of Proposed Rules 20-15.001, 20-15.002, and 20-15.003, Florida Administrative Code (the "Petition"). None of Petitioners was a party to DOAH Case No. 02-4607RP. The Petition seeks a clarification of the Final Order, or a new decision based upon new grounds and additional exhibits not considered in the earlier case.

On March 5, 2003, the parties to the instant case filed a stipulation for hearing. The parties stipulated that the hearing record in this case would include the record from Peace

River, supplemented by orders from Tampa Juice Service, Inc., et al. v. Department of Citrus, Case No. GCG-00-3718 (Consolidated), in the Tenth Judicial Circuit Court, in and for Polk County. The parties further stipulated that no hearing would be necessary in the instant case, and submitted a proposed schedule for the filing of memoranda of law. By Order dated March 10, 2003, the undersigned approved the parties' stipulation.

On March 21, 2003, Country Pure Foods, Inc., filed a Petition to Intervene in the instant case. The Department filed no objection to the Petition to Intervene, which was granted by Order dated May 9, 2003.

The parties timely filed their memoranda of law, which have been given full consideration in the deliberations leading to this Final Order.

FINDINGS OF FACT

Based on the stipulated facts, and the entire record in this proceeding, the following findings of fact are made:

1. The Florida Citrus Commission was established in 1935 to organize and promote the growing and sale of various citrus products, fresh and processed, in the State of Florida. The purpose of the Citrus Commission is today reflected in Section 601.02, Florida Statutes.

2. The powers of the Florida Citrus Commission ("the Commission") and the Department, are set forth in full in Section 601.10, Florida Statutes. The powers of the Department include the power to tax and raise other revenue to achieve the purposes of the Department. In particular, Section 601.10(1) and (2), Florida Statutes, state:

> The Department of Citrus shall have and shall exercise such general and specific powers as are delegated to it by this chapter and other statutes of the state, which powers shall include, but shall not be confined to, the following:
>
> (1) To adopt and, from time to time, alter, rescind, modify, or amend all proper and necessary rules, regulations, and orders for the exercise of its powers and the performance of its duties under this chapter and other statutes of the state, which rules and regulations shall have the force and effect of law when not inconsistent therewith.
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> (2) To act as the general supervisory authority over the administration and enforcement of this chapter and to exercise such other powers and perform such other duties as may be imposed upon it by other laws of the state.

3. The Department is authorized to set standards by Section 601.11, Florida Statutes, as follows:

> The Department of Citrus shall have full and plenary power to, and may, establish state grades and minimum maturity and quality standards not inconsistent with existing laws for citrus fruits and food products thereof containing 20 percent or more citrus or citrus juice, whether canned or concentrated, or otherwise processed,

including standards for frozen concentrate for manufacturing purposes, and for containers therefor, and shall prescribe rules or regulations governing the marking, branding, labeling, tagging, or stamping of citrus fruit, or products thereof whether canned or concentrated, or otherwise processed, and upon containers therefor for the purpose of showing the name and address of the person marketing such citrus fruit or products thereof whether canned or concentrated or otherwise processed; the grade, quality, variety, type, or size of citrus fruit, the grade, quality, variety, type, and amount of the products thereof whether canned or concentrated or otherwise processed, and the quality, type, size, dimensions, and shape of containers therefor, and to regulate or prohibit the use of containers which have been previously used for the sale, transportation, or shipment of citrus fruit or the products thereof whether canned or concentrated or otherwise processed, or any other commodity; provided, however, that the use of secondhand containers for sale and delivery of citrus fruit for retail consumption within the state shall not be prohibited; provided, however, that no standard, regulation, rule, or order under this section which is repugnant to any requirement made mandatory under federal law or regulations shall apply to citrus fruit, or the products thereof, whether canned or concentrated or otherwise processed, or to containers therefor, which are being shipped from this state in interstate commerce. All citrus fruit and the products thereof whether canned or concentrated or otherwise processed sold, or offered for sale, or offered for shipment within or without the state shall be graded and marked as required by this section and the regulations, rules, and orders adopted and made under authority of this section, which regulations, rules, and orders shall, when not inconsistent with

> state or federal law, have the force and effect of law.

4. The Department is authorized to conduct citrus research by Section 601.13, Florida Statutes.

5. To help pay for these duties of the Department, the Legislature first enacted the "box tax" in 1949. The box tax is now codified as Section 601.15(3), Florida Statutes.

6. Section 601.15(3)(a), Florida Statutes, provides in relevant part:

> There is hereby levied and imposed upon each standard-packed box of citrus fruit grown and placed into the primary channel of trade in this state an excise tax at annual rates for each citrus season as determined from the tables in this paragraph and based upon the previous season's actual statewide production as reported in the United States Department of Agriculture Citrus Crop Production Forecast as of June 1.

Section 601.15(3)(a), Florida Statutes, goes on to set forth specific rates for fresh grapefruit, processed grapefruit, fresh oranges, processed oranges, and fresh or processed tangerines and citrus hybrids.

7. Section 601.15(1), Florida Statutes, sets forth the Department's authority to administer the box tax, as follows:

> The administration of this section shall be vested in the Department of Citrus, which shall prescribe suitable and reasonable rules and regulations for the enforcement hereof, and the Department of Citrus shall administer the taxes levied and imposed hereby. All funds collected under this

> section and the interest accrued on such funds are consideration for a social contract between the state and the citrus growers of the state whereby the state must hold such funds in trust and inviolate and use them only for the purposes prescribed in this chapter. The Department of Citrus shall have power to cause its duly authorized agent or representative to enter upon the premises of any handler of citrus fruits and to examine or cause to be examined any books, papers, records, or memoranda bearing on the amount of taxes payable and to secure other information directly or indirectly concerned in the enforcement hereof. Any person who is required to pay the taxes levied and imposed and who by any practice or evasion makes it difficult to enforce the provisions hereof by inspection, or any person who, after demand by the Department of Citrus or any agent or representative designated by it for that purpose, refuses to allow full inspection of the premises or any part thereof or any books, records, documents, or other instruments in any manner relating to the liability of the taxpayer for the tax imposed or hinders or in anywise delays or prevents such inspection, is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

8. The box tax was challenged in 1936 under various provisions of the Florida Constitution as well as the Export Clause, Article 1, s. 9, cl. 5, of the United States Constitution. The Florida Supreme Court issued an opinion in 1937 upholding the validity of the box tax. C.V. Floyd Fruit Company v. Florida Citrus Commission, 128 Fla. 565, 175 So. 248 (1937).

9. In 1970, the Legislature enacted the "equalization tax," codified as Section 601.155, Florida Statutes. The statute mirrored Section 601.15, Florida Statutes, but added certain processors who were mixing foreign citrus products with Florida products. The purpose of the equalization tax was to have all Florida processors of citrus products help pay for the costs of the Department, rather than have the burden fall entirely on the Florida growers subject to the box tax.

10. Section 601.155, Florida Statutes, provides, in relevant part:

> (1) The first person who exercises in this state the privilege of processing, reprocessing, blending, or mixing processed orange products or processed grapefruit products or the privilege of packaging or repackaging processed orange products or processed grapefruit products into retail or institutional size containers or, except as provided in subsection (9) or except if a tax is levied and collected on the exercise of one of the foregoing privileges, the first person having title to or possession of any processed orange product or any processed grapefruit product who exercises the privilege in this state of storing such product or removing any portion of such product from the original container in which it arrived in this state for purposes other than official inspection or direct consumption by the consumer and not for resale shall be assessed and shall pay an excise tax upon the exercise of such privilege at the rate described in subsection (2).
>
> (2) Upon the exercise of any privilege described in subsection (1), the excise tax

> levied by this section shall be at the same rate per box of oranges or grapefruit utilized in the initial production of the processed citrus products so handled as that imposed, at the time of exercise of the taxable privilege, by s. 601.15 per box of oranges.

11. In order to administer the tax, the Legislature provided the following relevant provisions in Section 601.155, Florida Statutes:

> (6) Every person liable for the excise tax imposed by this section shall keep a complete and accurate record of the receipt, storage, handling, exercise of any taxable privilege under this section, and shipment of all products subject to the tax imposed by this section. Such record shall be preserved for a period of 1 year and shall be offered for inspection upon oral or written request by the Department of Citrus or its duly authorized agent.
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> (7) Every person liable for the excise tax imposed by this section shall, at such times and in such manner as the Department of Citrus may by rule require, file with the Department of Citrus a return, certified as true and correct, on forms to be prescribed and furnished by the Department of Citrus, stating, in addition to other information reasonably required by the Department of Citrus, the number of units of processed orange or grapefruit products subject to this section upon which any taxable privilege under this section was exercised during the period of time covered by the return. Full payment of excise taxes due for the period reported shall accompany each return.
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> (8) All taxes levied and imposed by this section shall be due and payable within 61 days after the first of the taxable privileges is exercised in this state.

> Periodic payment of the excise taxes imposed by this section by the person first exercising the taxable privileges and liable for such payment shall be permitted only in accordance with Department of Citrus rules, and the payment thereof shall be guaranteed by the posting of an appropriate certificate of deposit, approved surety bond, or cash deposit in an amount and manner as prescribed by the Department of Citrus.
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> * * *
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> (11) This section shall be liberally construed to effectuate the purposes set forth and as additional and supplemental powers vested in the Department of Citrus under the police power of this state.

12. In March 2000, certain citrus businesses challenged Section 601.155(5), Florida Statutes, as being unconstitutional. At the time of the suit, Section 601.155(5), Florida Statutes, read as follows:

> All products subject to the taxable privileges under this section, which products are produced in whole or in part from citrus fruit grown within the United States, are exempt from the tax imposed by this section to the extent that the products are derived from oranges or grapefruit grown within the United States. In the case of products made in part from citrus fruit grown within the United States, it shall be the burden of the persons liable for the excise tax to show the Department of Citrus, through competent evidence, proof of that part which is not subject to a taxable privilege.

13. The citrus businesses claimed the exemption in Section 601.155(5) rendered the tax unconstitutionally discriminatory, in that processors who imported juice from foreign countries to be blended with Florida juice were subject to the equalization tax, whereas processors who imported juice from places such as California, Arizona and Texas enjoyed an exemption from the tax. The case, Tampa Juice Service, Inc., et al. v. Department of Citrus, Case No. GCG-00-3718 (Consolidated) ("Tampa Juice"), was brought in the Tenth Judicial Circuit Court, in and for Polk County. Judge Dennis P. Maloney of that court continues to preside over that case.

14. In a partial final declaratory judgment effective March 15, 2002, Judge Maloney found Section 601.155, Florida Statutes, unconstitutional because it violated the Commerce Clause of the United States Constitution due to its discriminatory effect in favor of non-Florida United States juice. In an order dated April 15, 2002, Judge Maloney severed the exemption in Section 601.155(5), Florida Statutes, from the remainder of the statute.

15. The court's decision necessitated the formulation of a remedy for the injured plaintiffs. While the parties were briefing the issue before the court, the Florida Legislature met and passed Chapter 2002-26, Laws of Florida, which amended Section 601.155(5), Florida Statutes, to read as follows:

> Products made in whole or in part from citrus fruit on which an equivalent tax is levied pursuant to s. 601.15 are exempt from the tax imposed by this section. In the case of products made in part from citrus fruit exempt from the tax imposed by this section, it shall be the burden of the persons liable for the excise tax to show the Department of Citrus, through competent evidence, proof of that part which is not subject to a taxable privilege.

Chapter 2002-26, Laws of Florida, was given an effective date of July 1, 2002.

16. By order dated August 8, 2002, Judge Maloney set forth his decision as to the remedy for the plaintiffs injured by the discriminatory effect of Section 601.155(5), Florida Statutes. Judge Maloney expressly relied on the rationale set forth in Division of Alcoholic Beverages and Tobacco v. McKesson Corporation, 574 So. 2d 114 (Fla. 1991)("McKesson II").

17. In its initial McKesson decision, Division of Alcoholic Beverages and Tobacco v. McKesson Corporation, 524 So. 2d 1000 (Fla. 1988), the Florida Supreme Court affirmed a summary judgment ruling that Florida's alcoholic beverage tax scheme, which gave tax preferences and exemptions to certain alcoholic beverages made from Florida crops, unconstitutionally discriminated against interstate commerce. The Florida Supreme Court also affirmed that portion of the summary judgment giving the ruling prospective effect, thus denying the plaintiff a refund of taxes paid pursuant to the unconstitutional scheme.

18. The decision was appealed to the United States Supreme Court. In McKesson Corporation v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18 (1990), the United States Supreme Court reversed the Florida Supreme Court's decision as to the prospective effect of its decision. The United States Supreme Court held that:

> The question before us is whether prospective relief, by itself, exhausts the requirements of federal law. The answer is no: If a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.

496 U.S. at 31 (footnotes omitted).

19. The United States Supreme Court set forth the following options by which the state could meet its obligation to provide "meaningful backward-looking relief":

> [T]he State may cure the invalidity of the Liquor Tax by refunding to petitioner the difference between the tax it paid and the tax it would have been assessed were it extended the same rate reductions that its competitors actually received. . . . Alternatively, to the extent consistent with other constitutional restrictions, the State may assess and collect back taxes from petitioner's competitors who benefited from the rate reductions during the contested tax period, calibrating the retroactive assessment to create in hindsight a nondiscriminatory scheme. . . . Finally, a combination of a partial refund to

> petitioner and a partial retroactive assessment of tax increases on favored competitors, so long as the resultant tax actually assessed during the contested tax period reflects a scheme that does not discriminate against interstate commerce, would render Petitioner's resultant deprivation lawful and therefore satisfy the Due Process Clause's requirement of a fully adequate postdeprivation procedure.

496 U.S. at 40-41 (citations and footnotes omitted). The United States Supreme Court expressly provided that the state has the option of choosing the form of relief it will grant.

20. In keeping with the United States Supreme Court opinion, the Florida Supreme Court granted the Division of Alcoholic Beverages and Tobacco (the "Division") leave to advise the Court as to the form of relief the state wished to provide. The Division proposed to retroactively assess and collect taxes from those of McKesson's competitors who had benefited from the discriminatory tax scheme. McKesson contended that a refund of the taxes it had paid was the only clear and certain remedy, because retroactive taxation of its competitors would violate their due process rights. McKesson II, 574 So. 2d at 116.

21. The Florida Supreme Court remanded the case to the trial court for further proceedings on McKesson's refund claim, with the following instructions:

> While McKesson may not necessarily be entitled to a refund, it is entitled to a "clear and certain remedy," as outlined in the Supreme Court's opinion. Because

> nonparties, such as amici, will be directly affected by the retroactive tax scheme proposed by the state, all affected by the proposed emergency rule must be given notice and an opportunity to intervene in this action. Therefore, on remand, the trial court not only must determine whether the state's proposal meets "the minimum federal requirements" outlined in the Supreme Court's opinion, it also must determine whether the proposal comports with federal and state protections afforded those against whom the proposed tax will be assessed.
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> We emphasize that the state has the option of choosing the manner in which it will reformulate the alcoholic beverage tax during the contested period so that the resultant tax actually assessed during that period reflects a scheme which does not discriminate against interstate commerce. Therefore, if the trial court should rule that the state's proposal to retroactively assess and collect taxes from McKesson's competitors does not meet constitutional muster and such ruling is upheld on appeal, the state may offer an alternative remedy for the trial court's review. However, any such proposal likewise must satisfy the standards set forth by the Supreme Court as well as be consistent with other constitutional restrictions.

574 So. 2d at 116.

22. In the Tampa Juice case, Judge Maloney assessed the options prescribed by the series of McKesson cases and concluded that the only fair remedy was to assess and collect back assessments from those who benefited from the unconstitutional equalization tax exemption. His August 8, 2002, order directed the Department to "take appropriate steps, consistent with

existing law, to assess and collect the Equalization tax from those entities which [benefited] from the unconstitutional exemption."

23. On September 18, 2002, the Department promulgated the Emergency Rules that were at issue in DOAH Case No. 02-3648RE. The Emergency Rules were filed with the Department of State on September 24, 2002, and took effect on that date. Those emergency rules were held invalid in Peace River, and are not at issue in the instant case.

24. In the November 15, 2002 issue of the Florida Administrative Weekly (vol. 28, no. 46, pp. 4996-4998), the Department published the Proposed Rules that were at issue in DOAH Case No. 02-4607RP. In the March 7, 2003, issue of the Florida Administrative Weekly (vol. 29, no. 10, p. 1036), the Department published amendments to the Proposed Rule. The Proposed Rules, as amended, read as follows:

EQUALIZATION TAX ON NON-FLORIDA UNITED STATES JUICE

20-15.001 Intent.

(1) The Court in Tampa Juice Service, et al v. Florida Department of Citrus in Consolidated Case Number GCG-003718 (Circuit Court in and for Polk County, Florida) severed the exemption contained in Section 601.155(5), Florida Statutes, that provided an exemption for persons who exercised one of the enumerated Equalization Tax privileges on non-Florida, United States juice. The Court had previously determined

that the stricken provisions operated in a manner that violated the Commerce Clause of the United States Constitution. On August 8, 2002, the Court ordered that the Florida Department of Citrus "take appropriate steps, consistent with existing law, to assess and collect the Equalization tax from those entities which [benefited] from the unconstitutional exemption."

(2) It is the Florida Department of Citrus' intent by promulgating the following remedial rule to implement a non-discriminatory tax scheme, which does not impose a significant tax burden that is so harsh and oppressive as to transgress constitutional limitations. These rules shall be applicable to those previously favored persons who received favorable tax treatment under the statutory sections cited above.

Specific Authority 601.02, 601.10, 601.15, 601.155 FS. Law Implemented 601.02, 601.10, 601.15, 601.155 FS. History-- New .

20-15.002 Definitions.

(1) "Previously favored persons" shall be defined as any person who exercised an enumerated Equalization Tax privilege as defined by Section 601.155, Florida Statutes, but who was exempt from payment of the Equalization Tax due to the exemption for non-Florida, United States juice set forth in the statutory provision, which was ultimately determined to be unconstitutional and severed from Section 601.155(5), Florida Statutes.

(2) The "tax period" during which the severed provisions of Section 601.155(5), Florida Statutes, were in effect shall be defined as commencing on October 6, 1997, and ending on March 14, 2002.

(3) "Tax liability" shall be defined as the total amount of taxes due to the Florida Department of Citrus during the "tax period," at the following rates per box for each respective fiscal year:

Fiscal Year	Processed Rate	
	Orange	Grapefruit
1997-1998	.175	.30
1998-1999	.17	.30
1999-2000	.18	.325
2000-2001	.175	.30
2001-2002	.165	.18

Specific Authority 601.02, 601.10, 601.15, 601.155 FS. Law Implemented 601.02, 601.10, 601.15, 601.155 FS. History-- New .

20-15.003 Collection.

(1) The Florida Department of Citrus shall calculate the tax liability for each person or entity that exercised an enumerated Equalization Tax privilege outlined in section 601.155, Florida Statutes, upon non-Florida, United States juice based upon inspection records maintained by Florida Department of Agriculture and Consumer Services and the United States Department of Agriculture.

(2) Subsequent to adoption of this rule, the Florida Department of Citrus will provide to the previously favored persons by certified mail a Notice of Tax Liability which shall contain a demand for payment consistent with the above-referenced itemized statement. The Department will deem late payment of Equalization Taxes owed by previously favored persons to constitute good cause, and shall waive the 5 percent penalty authorized by Section 601.155(10), F.S., as compliance with either of the following is established by Department [sic]:

(a) Lump sum payment of the tax liability remitted with the filing of Department of Citrus Form 4R (incorporated by reference in Rule 20-100.004, F.A.C.) for the relevant years and then-applicable tax rate(s) per subsection 20-15.002(3), F.A.C., within 61 days of receiving Notice of Tax Liability; or

(b) Equal installment payments remitted with the filing of Department of Citrus Form 4R (incorporated by reference in Rule 20-100.004, F.A.C.) for the relevant years and then-applicable tax rate(s) per subsection subsection [sic] 20-15.002(3), F.A.C., over a 60-month period, the first payment being due within 61 days of receiving Notice of Tax Liability pursuant to subsection 20-15.003(2), F.A.C.; or

(c) The Good Cause provisions of 601.155(10), F.S., shall not apply to persons who do not comply with paragraph 20-15.003(2)(a), F.A.C., or paragraph 20-15.003(2)(b), F.A.C.

(d) Failure to pay the taxes or penalties due under 601.155, F.S. and Chapter 20-15, F.A.C., shall constitute grounds for revocation or suspension of a previously favored person's citrus fruit dealer's license pursuant to 601.56(4), F.S., 601.64(6), F.S., 601.64(7), F.S., and/or 601.67(1), F.S.

(3) The Florida Department of Citrus will not oppose the timely intervention of persons who previously enjoyed the subject exemption that wish to present a claim to the Court in the Tampa Juice Service, Inc., et al v. Florida Department of Citrus. However, the Florida Department of Citrus does not waive any argument regarding the validity of the calculation of the tax liability or that imposition of this tax is constitutional.

Specific Authority 601.02, 601.10, 601.15, 601.155 FS. Law Implemented 601.02, 601.10, 601.15, 601.155 FS. History-- New .

25. The Final Order in Peace River held that the Proposed Rules were not an invalid exercise of delegated legislative authority, for reasons discussed in the Conclusions of Law below.

26. Judge Maloney has yet to rule on the backward-looking remedy proposed by the Department. On March 26, 2003, Judge Maloney entered an order extending until May 1, 2003, the time for interested parties to file motions to intervene with regard to the Department's proposed backward-looking relief. The order noted that the parties have stipulated to the suspension of the back tax as to plaintiffs and objecting non-parties until further order of the court.

27. On February 19, 2003, Judge Maloney entered an "Order Granting Plaintiffs' Motion for Partial Summary Judgment--Import-Export." The sole issue before Judge Maloney was "whether Section 601.155, Florida Statutes, (the 'Equalization Tax'), as it existed in 1997, violates Article I, Section 10, clause 2 of the Constitution of the United States (the 'Import-Export Clause')." (Emphasis in original) After setting forth the standard for analysis of whether a taxing scheme violates the Import-Export Clause under Michelin Tire Corp. v. Wages, 423

U.S. 276, 96 S. Ct. 535, 46 L.Ed.2d 495 (1976), Judge Maloney ruled as follows:

> It is precisely [the exemption for United States products found in 601.155(5), Florida Statutes] that causes the 1997 Equalization Tax to contravene the Import-Export Clause. Specifically, the court finds that because the statute exempts "citrus fruit grown within the United States," but does not exempt citrus fruit grown in foreign countries, the exemption causes the tax to "fall on imports as such simply because of their place of origin." Michelin, 423 U.S. at 286. Additionally, because the tax falls on foreign-grown citrus as such simply because of its origin but does not fall on domestic-grown citrus, the Equalization Tax, with the exemption, creates a "special tariff or particular preference for certain domestic goods." Id. (i.e. California, Arizona, and Texas citrus products).
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> * * *
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> In conclusion, because the court finds the exemption contained within the 1997 Equalization Tax violates both the first and third elements of the Michelin test,[1] the court finds the 1997 Equalization Tax violates Article I, Section 10, clause 2 of the Constitution of the United States (the "Import-Export Clause").

28. On March 31, 2003, Judge Maloney entered an "Order Granting Plaintiffs' Motion for Partial Summary Judgment." In this order, Judge Maloney found that the box tax itself, Section 601.15, Florida Statutes, violates the First Amendment to the United States Constitution.

29. Petitioners and Intervenor in the instant case are licensed citrus fruit dealers regulated by Chapter 601, Florida Statutes. As such, they are subject to the rules of the Department. Petitioners and Intervenor buy, sell, and manufacture citrus juices. They shipped products made with non-Florida U.S. juice during the tax period without paying equalization taxes. Petitioners and Intervenor have been notified by the Department that they are liable to pay back taxes pursuant to the Proposed Rules, as well as the invalid Emergency Rules.

CONCLUSIONS OF LAW

30. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to these proceedings pursuant to Section 120.56, Florida Statutes.

31. Section 120.56(1)(a), Florida Statutes, provides: "Any person substantially affected by a rule or a proposed rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority." Section 120.56(2)(a), Florida Statutes, provides that in challenges to proposed rules, "Petitioner has the burden of going forward. The agency then has the burden to prove by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised."

32. Petitioners and the Intervenor are licensed citrus fruit dealers regulated by Chapter 601, Florida Statutes. During the tax period, they imported, stored and blended non-Florida United States citrus juices. Petitioners have demonstrated that they would be substantially affected by the Proposed Rules and accordingly have standing to bring this rule challenge. Petitioners have alleged a real and sufficiently immediate injury in fact, in that the Proposed Rules would subject them to payment of taxes for the period in question and to penalties for non-payment. Petitioners' alleged injury is within the zone of interest that is regulated by the statutes purportedly implemented by the Proposed Rules. See Lanoue v. Florida Department of Law Enforcement, 751 So. 2d 94 (Fla. 1st DCA 1999), and cases cited therein regarding the "substantially affected" test to establish standing in a rule challenge proceeding.

33. Section 120.52(8), Florida Statutes (2002), provides:

> "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 of the following applies:
>
> (a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;

(b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;

(c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;

(d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;

(e) The rule is arbitrary or capricious;

(f) The rule is not supported by competent substantial evidence; or

(g) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute.

34. The statutory provisions cited by the Department as specific authority for the proposed rules are Sections 601.02, 601.10, 601.15, and 601.155, Florida Statutes. Section 601.02, Florida Statutes, sets forth the purposes of Chapter 601, Florida Statutes, and provides:

> (1) In the exercise of the police power to protect health and welfare and to stabilize and protect the citrus industry of the state.
>
> (2) Because the planting, growing, cultivating, spraying, pruning, and fertilizing of citrus groves and the harvesting, hauling, processing, packing, canning, and concentrating of the citrus crop produced thereon is the major agricultural enterprise of Florida and, together with the sale and distribution of said crop, affects the health, morals, and general economy of a vast number of citizens of the state who are either directly or indirectly dependent thereon for a livelihood, and said business is therefore of vast public interest.
>
> (3) Because it is wise, necessary, and expedient to protect and enhance the quality and reputation of Florida citrus fruit and the canned and concentrated products thereof in domestic and foreign markets.
>
> (4) To provide means whereby producers, packers, canners, and concentrators of citrus fruit and the canned and concentrated products thereof may secure prompt and efficient inspection and classification of grades of citrus fruit and the canned and concentrated products thereof at reasonable costs, it being hereby recognized that the standardization of the citrus fruit industry of Florida by the proper grading and classification of citrus fruit and the

canned and concentrated products thereof by prompt and efficient inspection under competent authority is beneficial alike to producer, packer, shipper, canner, concentrator, carrier, receiver, and consumer in that it furnishes them prima facie evidence of the quality and condition of such products and informs the carrier and receiver of the quality of the products carried and received by them and assures the ultimate consumer of the quality of the products purchased.

(5) To enable citrus producers collectively to pay assessments to fund marketing and research programs for the direct benefit of the citrus industry of this state. It is the intent of the Legislature that all funds collected under this chapter and the interest accrued on such funds are consideration for a social contract between the state and the citrus growers of the state whereby the state must hold such funds in trust and inviolate and use them only for the purposes prescribed in this chapter.

(6) To stabilize the Florida citrus industry and to protect the public against fraud, deception, and financial loss through unscrupulous practices and haphazard methods in connection with the processing and marketing of citrus fruit and the canned or concentrated products thereof.

(7) Because said act is designed to promote the general welfare of the Florida citrus industry, which in turn will promote the general welfare and social and political economy of the state.

In the event any word, phrase, clause, sentence, paragraph, or section of this chapter is declared unconstitutional by any court of competent jurisdiction, then such declaration of such unconstitutionality shall not affect the remainder of this

> chapter, and the unconstitutional portion shall be considered severable, it being the intent of the Legislature that the remainder of this chapter shall continue in full force and effect.

35. Section 601.10, Florida Statutes, is quoted, supra, in paragraph 2.

36. Section 601.15, Florida Statutes, provides as follows, in relevant part to the provisions of the Proposed Rules:

> (1) The administration of this section shall be vested in the Department of Citrus, which shall prescribe suitable and reasonable rules and regulations for the enforcement hereof, and the Department of Citrus shall administer the taxes levied and imposed hereby. All funds collected under this section and the interest accrued on such funds are consideration for a social contract between the state and the citrus growers of the state whereby the state must hold such funds in trust and inviolate and use them only for the purposes prescribed in this chapter. The Department of Citrus shall have power to cause its duly authorized agent or representative to enter upon the premises of any handler of citrus fruits and to examine or cause to be examined any books, papers, records, or memoranda bearing on the amount of taxes payable and to secure other information directly or indirectly concerned in the enforcement hereof. Any person who is required to pay the taxes levied and imposed and who by any practice or evasion makes it difficult to enforce the provisions hereof by inspection, or any person who, after demand by the Department of Citrus or any agent or representative designated by it for that purpose, refuses to allow full inspection of the premises or any part thereof or any books, records, documents, or other instruments in any manner relating to

the liability of the taxpayer for the tax imposed or hinders or in anywise delays or prevents such inspection, is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

(2) The Department of Citrus shall plan and conduct campaigns for commodity advertising, publicity, and sales promotion, and may conduct campaigns to encourage noncommodity advertising, to increase the consumption of citrus fruits and may contract for any such advertising, publicity, and sales promotion service. . . .

* * *

(4) Every handler shall keep a complete and accurate record of all citrus fruit handled by her or him. Such record shall be in such form and contain such other information as the Department of Citrus shall by rule or regulation prescribe. Such records shall be preserved by such handlers for a period of 1 year and shall be offered for inspection at any time upon oral or written demand by the Department of Citrus or its duly authorized agents or representatives.

(5) Every handler shall, at such times and in such manner as the Department of Citrus may by rule require, file with the Department of Citrus a return certified as true and correct, on forms furnished by the Department of Citrus, stating, in addition to other information, the number of standard-packed boxes of each kind of citrus fruit handled by such handler in the primary channel of trade during the period of time covered by the return. Full payment of all excise taxes due for the period reported shall accompany each handler's return.

* * *

(9)(a) Any handler who fails to file a return or to pay any tax within the time required shall thereby forfeit to the Department of Citrus a penalty of 5 percent of the amount of tax determined to be due; but the Department of Citrus, if satisfied that the delay was excusable, may remit all or any part of such penalty. Such penalty shall be paid to the Department of Citrus and disposed of as provided with respect to moneys derived from the taxes levied and imposed by subsection (3).

(b) The Department of Citrus may collect any taxes levied and assessed by this chapter in any or all of the following methods:

1. By the voluntary payment by the person liable therefor.

2. By a suit at law.

3. By a suit in equity to enjoin and restrain any handler, citrus fruit dealer, or other person owing such taxes from operating her or his business or engaging in business as a citrus fruit dealer until the delinquent taxes are paid. Such action may include an accounting to determine the amount of taxes plus delinquencies due. In any such proceeding, it is not necessary to allege or prove that an adequate remedy at law does not exist.

(10) The powers and duties of the Department of Citrus include the following:

(a) To adopt and from time to time alter, rescind, modify, and amend all proper and necessary rules, regulations, and orders for the exercise of its powers and the performance of its duties under this chapter. . . .

37. Section 601.155, Florida Statutes, at the time of the suit in Tampa Juice Service, provided as follows, in relevant part:

> (1) The first person who exercises in this state the privilege of processing, reprocessing, blending, or mixing processed orange products or processed grapefruit products or the privilege of packaging or repackaging processed orange products or processed grapefruit products into retail or institutional size containers or, except as provided in subsection (9) or except if a tax is levied and collected on the exercise of one of the foregoing privileges, the first person having title to or possession of any processed orange product or any processed grapefruit product who exercises the privilege in this state of storing such product or removing any portion of such product from the original container in which it arrived in this state for purposes other than official inspection or direct consumption by the consumer and not for resale shall be assessed and shall pay an excise tax upon the exercise of such privilege at the rate described in subsection (2).
>
> (2) Upon the exercise of any privilege described in subsection (1), the excise tax levied by this section shall be at the same rate per box of oranges or grapefruit utilized in the initial production of the processed citrus products so handled as that imposed, at the time of exercise of the taxable privilege, by s. 601.15 per box of oranges.
>
> (3) For the purposes of this section, the number of boxes of oranges or grapefruit utilized in the initial production of processed citrus products subject to the taxable privilege shall be:

(a) The actual number of boxes so utilized, if known and verified in accordance with Department of Citrus rules; or

(b) An equivalent number established by Department of Citrus rule which, on the basis of existing data, reasonably equates to the quantity of citrus contained in the product, when the actual number of boxes so utilized is not known or properly verified.

(4) For purposes of this section:

(a) "Processed orange products" means products for human consumption consisting of 20 percent or more single strength equivalent orange juice; orange sections, segments, or edible components; or whole peeled fruit.

(b) "Processed grapefruit products" means products for human consumption consisting of 20 percent or more single strength equivalent grapefruit juice; grapefruit sections, segments, or edible components; or whole peeled fruit.

(c) "Original container" includes any vessel, tanker or tank car or other transport vehicle.

(d) "Retail or institutional container" means a container having a capacity of 10 gallons or less.

(5) All products subject to the taxable privileges under this section, which products are produced in whole or in part from citrus fruit grown within the United States, are exempt from the tax imposed by this section to the extent that the products are derived from oranges or grapefruit grown within the United States. In the case of products made in part from citrus fruit grown within the United States, it shall be the burden of the persons liable for the

excise tax to show the Department of Citrus, through competent evidence, proof of that part which is not subject to a taxable privilege.

Products made in whole or in part from citrus fruit on which an equivalent tax is levied pursuant to s. 601.15 are exempt from the tax imposed by this section. In the case of products made in part from citrus fruit exempt from the tax imposed by this section, it shall be the burden of the persons liable for the excise tax to show the Department of Citrus, through competent evidence, proof of that part which is not subject to a taxable privilege.

(6) Every person liable for the excise tax imposed by this section shall keep a complete and accurate record of the receipt, storage, handling, exercise of any taxable privilege under this section, and shipment of all products subject to the tax imposed by this section. Such record shall be preserved for a period of 1 year and shall be offered for inspection upon oral or written request by the Department of Citrus or its duly authorized agent.

(7) Every person liable for the excise tax imposed by this section shall, at such times and in such manner as the Department of Citrus may by rule require, file with the Department of Citrus a return, certified as true and correct, on forms to be prescribed and furnished by the Department of Citrus, stating, in addition to other information reasonably required by the Department of Citrus, the number of units of processed orange or grapefruit products subject to this section upon which any taxable privilege under this section was exercised during the period of time covered by the return. Full payment of excise taxes due for the period reported shall accompany each return.

(8) All taxes levied and imposed by this section shall be due and payable within 61 days after the first of the taxable privileges is exercised in this state. Periodic payment of the excise taxes imposed by this section by the person first exercising the taxable privileges and liable for such payment shall be permitted only in accordance with Department of Citrus rules, and the payment thereof shall be guaranteed by the posting of an appropriate certificate of deposit, approved surety bond, or cash deposit in an amount and manner as prescribed by the Department of Citrus.

(9) When any processed orange or grapefruit product is stored or removed from its original container as provided in subsection (1), the equalizing excise tax is levied on such storage or removal, and such product is subsequently shipped out of the state in a vessel, tanker or tank car, or container having a capacity greater than 10 gallons, the person who is liable for the tax shall be entitled to a tax refund, if such tax has been paid, or to a tax credit, provided she or he can provide satisfactory proof that such product has been shipped out of the state and that no privilege taxable under subsection (1) other than storage or removal from the original container was exercised prior to such shipment out of the state.

(10) All excise taxes levied and collected under the provisions of this section, including penalties, shall be paid into the State Treasury to be made a part of the Florida Citrus Advertising Trust Fund in the same manner, for the same purposes, and in the same proportions as set forth in s. 601.15(7). Any person failing to file a return or pay any assessment within the time required shall thereby forfeit to the Department of Citrus a penalty of 5 percent of the amount of assessment then due; but the Department of Citrus, on good cause

> shown, may waive all or any part of such penalty.
>
> (11) This section shall be liberally construed to effectuate the purposes set forth and as additional and supplemental powers vested in the Department of Citrus under the police power of this state.

38. Chapter 2002-26, Laws of Florida, amended Section 601.155(5), Florida Statutes, to read as follows:

> Products made in whole or in part from citrus fruit on which an equivalent tax is levied pursuant to s. 601.15 are exempt from the tax imposed by this section. In the case of products made in part from citrus fruit exempt from the tax imposed by this section, it shall be the burden of the persons liable for the excise tax to show the Department of Citrus, through competent evidence, proof of that part which is not subject to a taxable privilege.

39. The Final Order in Peace River, holding that the Proposed Rules were not an invalid exercise of delegated legislative authority, was premised on the facts that Judge Maloney had found Section 601.155, Florida Statutes (2001), unconstitutional as violative of the Commerce Clause of the United States Constitution, and that Judge Maloney had severed the unconstitutional portion, Section 601.155(5), from the remainder of the statute. That severance, and Judge Maloney's order that the Department devise a meaningful backward-looking remedy for the unconstitutional discrimination caused by the operation of Section 601.155(5), Florida Statutes, led the

undersigned to conclude that the exemption, and only the exemption, had been held void ab initio and that Petitioners who had enjoyed the exemption were now subject to taxation as if the exemption had never existed.

40. Petitioners in Peace River, as well as Petitioners in the instant case, urged that this conclusion was flawed because the analysis in a rule challenge proceeding is confined to a determination of whether the Legislature has affirmatively granted the agency authority for the rules proposed. Petitioners noted that Section 120.54(1)(f), Florida Statutes, prohibits an agency from adopting retroactive rules "unless the power is expressly authorized by law." Because the Legislature's amendment of Section 601.155(5), Florida Statutes, in Chapter 2002-26, Laws of Florida, was silent as to retroactive application, Petitioners contend that the Department has no statutory authority to collect the Equalization Tax retroactively, regardless of the implications of Judge Maloney's orders.

41. The Final Order in Peace River rejected Petitioners' argument, because the requirements of the Administrative Procedure Act cannot operate to preempt the constitutional authority of an Article V court to declare a tax exemption unconstitutional and void ab initio, and to order a state agency to provide appropriate relief to affected parties. The

legislative silence in Chapter 2002-26, Laws of Florida, as to retroactive application could not define or limit the court's constitutional jurisdiction. Petitioners in the instant case have offered no convincing reasons for the undersigned to recede from the analysis in Peace River.

42. However, the analysis cannot end at this point. Petitioners have submitted two orders entered by Judge Maloney after the Final Order in Peace River. Judge Maloney's order of February 19, 2003, found Section 601.155, Florida Statutes, "as it existed in 1997,"[2] violates the Import-Export Clause of the United States Constitution. This order makes clear that the constitutional deficiency lies in the exemption already found unconstitutional in Judge Maloney's prior order of March 15, 2002. However, the parties have presented no order subsequent to February 19, 2003, that severs Section 601.155(5), Florida Statutes, from the remainder of the equalization tax. Thus, the plain wording of the February 19, 2003, order leads to the conclusion that Judge Maloney has invalidated the entirety of Section 601.155, Florida Statutes.

43. Petitioners point out that the Import-Export Clause, unlike the Commerce Clause, states an absolute ban on legislative enactments contravening its terms. Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies, 435 U.S. 734, 751 (1978). Thus, it must

be concluded that Judge Maloney's order has the effect of holding the equalization tax void ab initio.

44. While Section 601.155, Florida Statutes, is not the only statute cited as authority for the Proposed Rules, it is obviously their basis. Without the substance of the equalization tax, Sections 601.02, 601.10, and 601.15, Florida Statutes, cannot be read to authorize the retroactive collection of equalization taxes contemplated by the Proposed Rules.

45. Further, in an order dated March 31, 2003, Judge Maloney found that the box tax, Section 601.15, Florida Statutes, violates plaintiffs' rights guaranteed by the First Amendment to the United States Constitution. Thus, the entire taxing scheme by which the Department and the Commission finance the performance of their duties has been held unconstitutional by Judge Maloney.

46. Section 120.52(8), Florida Statutes, provides: "A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required." As to the Proposed Rules, the "specific law to be implemented" has itself been held unconstitutional and invalid. There is no longer a specific law to be implemented. The Proposed Rules are therefore an invalid exercise of delegated legislative authority.

47. Section 120.52(8)(e), Florida Statutes, provides that a proposed rule is an invalid exercise of delegated legislative authority if it is "arbitrary or capricious." An "arbitrary" decision is one not supported by facts or logic, or despotic. A "capricious" decision is one taken irrationally, or without thought or reason. Board of Clinical Laboratory Personnel v. Florida Association of Blood Banks, 721 So. 2d 317, 318 (Fla. 1st DCA 1998); Board of Trustees of the Internal Improvement Trust Fund v. Levy, 656 So. 2d 1359, 1362 (Fla. 1st DCA 1995). In undertaking this analysis, the undersigned is mindful that these definitions:

> add color and flavor to our traditionally dry legal vocabulary, but do not assist an objective legal analysis. If an administrative decision is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, it would seem that the decision is neither arbitrary nor capricious.

Dravo Basic Materials Company, Inc. v. Department of Transportation, 602 So. 2d 632, 634 n.3 (Fla. 2d DCA 1992).

48. Under any of the standards provided by the cited cases, the Proposed Rules are arbitrary and capricious for the simple reason that the underlying equalization tax has been held void ab initio by a court of competent jurisdiction. There is no longer any statute that even arguably authorizes the

Department to collect the equalization tax on a retroactive or any other basis.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED that Proposed Rules 20-15.001, 20-15.002, and 20-15.003, Florida Administrative Code, constitute an invalid exercise of delegated legislative authority.

DONE AND ORDERED this 20th day of May, 2003, in Tallahassee, Leon County, Florida.

LAWRENCE P. STEVENSON
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
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of May, 2003.

ENDNOTES

1/ The first element of the Michelin test, as restated by Judge Maloney, is that "the Federal government must speak with one voice." A tax is violative of the first element if it: a) falls on imports as such simply because of their place of origin, or b) creates special tariffs or particular preferences for certain domestic goods, or c) can be applied selectively to encourage or discourage any importation in a manner inconsistent with federal regulations. Michelin, 423 U.S. at 287. The third

element of the Michelin test is "maintaining harmony between the states." A tax is violative of the third element if it: a) does not fall upon a taxpayer with a reasonable nexus to the state, or b) is not properly apportioned, or c) discriminates, or d) does not reasonably relate to services provided by the state.

2/ Save for a technical amendment to Section 601.155(2), Florida Statutes, enacted in Chapter 2000-154, section 79, the Equalization Tax was unchanged from 1997 until the 2002 amendment quoted above.

COPIES FURNISHED:

Kristen C. Gunter, Esquire
Macfarlane Ferguson & McMullen
1501 South Florida Avenue
Lakeland, Florida 33803

Eric J. Taylor, Esquire
Attorney General's Office
Tax Section
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

Ken Keck, Esquire
Department of Citrus
Post Office Box 148
Lakeland, Florida 33802-0148

Hank Campbell, Esquire
Post Office Box 3
Lakeland, Florida 33801-0003

Mia McKown, General Counsel
Department of Citrus
Post Office Box 148
Lakeland, Florida 32399-2100

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

Liz Cloud, Chief
Bureau of Administrative Code
The Elliott Building, Room 201
Tallahassee, Florida 32399-0250

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 the original notice of appeal with the Clerk of the Division of Administrative Hearings and a 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.