STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TIMES PUBLISHING, CO.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case Nos. 08-3938
	)	08-3939
DEPARTMENT OF REVENUE,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the final hearing of this case for the Division of Administrative Hearings (DOAH) on June 10 and 11, 2009, in Tampa, Florida.

APPEARANCES

For Petitioner: Wilson Jerry Foster, Esquire
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Tallahassee, Florida 32312

For Respondent: John Mika, Esquire
Office of the Attorney General
The Capitol - Tax Section
Tallahassee, Florida 32399-1050

STATEMENT OF THE ISSUE

The issue is whether Petitioner showed by a preponderance of the evidence that it is entitled to a refund of $1,500,216.60 in sales and use tax paid during the period from January 2005 through January 2007 to purchase industrial printing machinery that allegedly satisfied the statutory requirement for a 10

percent increase in productive output for printing facilities that manufacture, process, compound or produce tangible personal property at fixed locations in the state within the meaning of Subsection 212.08(5)(b), Florida Statutes (2005), and Florida Administrative Rule 12A-1.096.[1/]

PRELIMINARY STATEMENT

This proceeding has a long procedural history. Material portions of the procedural history of this case are discussed in the Findings of Fact. At this juncture in the Recommended Order, it is sufficient to say that Petitioner requested an administrative hearing to contest the proposed denial of a refund. Respondent referred the request for hearing to DOAH to assign an Administrative Law Judge to conduct the hearing.

At the hearing, Petitioner presented the testimony of two witnesses and submitted 10 exhibits for admission into evidence. Respondent presented the testimony of six witnesses and submitted 28 exhibits.

The identity of the witness and exhibits, and the rulings regarding each, are reported in the four-volume Transcript of the hearing filed with DOAH on July 16, 2009 and September 21, 2009. The ALJ granted the unopposed request to keep the record open to allow Respondent an opportunity to present rebuttal testimony. The ALJ conducted a telephone hearing on August 21, 2009, concerning the request for rebuttal testimony. At the

conclusion of the hearing, Respondent withdrew its request for rebuttal testimony.

The transcript of the motion hearing was filed with DOAH on September 21, 2009. Petitioner and Respondent filed their respective PROs on October 1, 2009.

FINDINGS OF FACT

1. Respondent is the agency responsible for administering the state sales tax imposed in Chapter 212. Petitioner is a "for profit" Florida corporation located in St. Petersburg, Florida. Petitioner is engaged in the business of publishing newspapers and commercial printing. Petitioner derives approximately 85 percent of its revenue from advertising and approximately 15 percent of its revenue from circulation subscriptions.

2. In April, 2007, Petitioner requested a refund of $403,780.05 in sales and use taxes paid for the purchase of industrial machinery and equipment during the period from January, 2005, to January, 2006. In October, 2007, Petitioner requested a refund of $1,096,436.61 in sales and use taxes paid for the purchase of industrial machinery and equipment for the period from January, 2006, to January, 2007.

3. The first refund request in April, 2007, became DOAH Case Number 08-3938, and the second refund request in October, 2007, became DOAH Case Number 08-3939. The two cases were

consolidated into this proceeding pursuant to the joint motion of the parties.

4. The parties stipulated that the only issue for determination in this consolidated proceeding is whether Petitioner satisfied the requirement for a 10 percent increase in productive output in Subsection 212.08(5)(b) and Rule 12A-1.096. If a finding were to be made that Petitioner satisfied the 10 percent requirement, the parties stipulate that the file will be returned to Respondent for a determination of whether the items purchased are qualifying machinery and equipment defined in Subsection 212.08(5)(b) and Rule 12A-1.096.

5. The issue of whether Petitioner satisfied the statutory requirement for a 10 percent increase in productive output in Subsection 212.08(5)(b) and Rule 12A-1.096 is a mixed question of law and fact. The ALJ concludes as a matter of law that Petitioner did not satisfy the 10 percent requirement. The ALJ discusses that conclusion briefly, for context, in paragraphs 6 and 7 of the Findings of Fact, and explains the conclusion and the supporting legal authority more fully in the Conclusions of Law.

6. It is an undisputed fact that Petitioner counts items identified in the record as "preprints," "custom inserts," and "circulation inserts" separately from the "newspaper" as a means of exceeding the 10 percent requirement in Subsection

212.08(5)(b). Respondent construes the 10 percent exemption authorized in Subsection 212.08(5)(b) in pari materia with the exemption authorized in Subsection 212.08(5)(1)(g) for "preprints," "custom inserts," and "circulation inserts" (hereinafter "inserts"). The latter statutory exemption treats inserts as a "component part of the newspaper" which are not to be treated separately for tax purposes.

7. For reasons stated more fully in the Conclusions of Law, the ALJ agrees with the statutory construction adopted by Respondent. That conclusion of law renders moot and, therefore, irrelevant and immaterial, the bulk of the evidence put forth by the parties during the two-day hearing because the evidence assumed arguendo that Petitioner's statutory interpretation would be adopted by the ALJ, i.e., inserts would be counted separately from the newspaper for purposes of satisfying the 10 percent requirement in Subsection 212.08(5)(b).

8. In an abundance of caution, the fact-finder made findings of fact based on the legal assumption that inserts are statutorily required to be counted separately for purposes of the 10 percent requirement in Subsection 212.08(5)(b). Those findings are set forth in paragraphs 9 through 11.

9. The verification audit by Respondent's field office was able to verify an output increase of only 4.27 percent for 2005

and only 8.72 percent for 2006. A preponderance of evidence in this de novo proceeding did not overcome those findings.

10. The trier of fact finds the evidence from Petitioner during this de novo proceeding to be inconsistent and unpersuasive. For example, Petitioner inflated production totals by counting materials printed for its own use, and materials in which the unit of measurement was inconsistent. In other instances, production totals for printing presses identified in the record as Didde and Ryobi presses varied dramatically with circulation. In other instances, Petitioner's reporting positions changed during the course of the proceeding.

11. There is scant evidence that the alleged increase in production created jobs in the local market in a manner consistent with legislative intent. Rather, a preponderance of evidence shows that when Petitioner placed the equipment in service it was job neutral or perhaps reduced jobs.

CONCLUSIONS OF LAW

12. DOAH has jurisdiction over the subject matter and parties in this proceeding. §§ 120.569, 120.57(1), and 212.12, Fla. Stat. (2009). DOAH provided the parties with adequate notice of the administrative hearing.

13. Respondent has the initial burden of proof. Respondent must make a prima facie showing of the factual and legal sufficiency of the denial of refund. § 120.80(14)(b)2.

The burden of proof then shifts to Petitioner to show by a preponderance of the evidence that Petitioner is entitled to a refund of tax. IPC Sports v. Department of Revenue, 829 So. 2d 330, 332 (Fla. 3d DCA 2002).

14. Respondent made a prima facie showing of the factual and legal sufficiency of the denial of refund. The proposed denial of refund was appropriate based on the verification audit performed by the field office.

15. Petitioner failed to show by a preponderance of the evidence that Petitioner is entitled to a refund. Subsection 212.08(5)(b) provides an exemption from sales tax, in relevant part, for industrial machinery and equipment purchased for use in expanding manufacturing facilities or plant units. The statute requires an affirmative showing by the taxpayer, to the satisfaction of the Department of Revenue (DOR), that the items purchased are used to increase productive output by not less than 10 percent (hereinafter, the "10 percent exemption").

16. Tax exemption statutes are matters of legislative grace. They must be strictly construed against the taxpayer. State Department of Revenue v. Anderson, 403 So. 2d 397, 399 (Fla. 1981); Department of Revenue v. Bank of America, N.A., 752 So. 2d 637, 641 (Fla. 1st DCA 2000); Asphalt Pavers, Inc. v. Department of Revenue, 584 So. 2d 55, 57 (Fla. 1st DCA 1991).

17. Respondent construes the 10 percent exemption authorized in Subsection 212.08(5)(b) in pari materia with the exemption authorized in Subsection 212.08(5)(1)(g) for "preprints," "custom inserts," and "circulation inserts" (hereinafter "inserts"). The latter statutory exemption treats inserts as a "component part of the newspaper".

18. Respondent's statutory construction is reasonable under the facts in this case. Petitioner cited no legal authority supporting a different statutory authority or showing that Respondent's statutory construction is erroneous.

19. A statutory subsection, such as the 10 percent exemption in Subsection 212.08(5)(b), cannot be read in isolation. The 10 percent exemption must be read "within the context of the entire section", and due regard must be given to the contextual interrelationship between its parts. See Lamar Outdoor Advertising-Lakeland v. Florida Department of Advertising, Case No. 1D08-5369 (Fla. 1st DCA Aug. 19, 2009) (citing Florida Department of Environmental Protection v. ContractPoint Florida Parks, LLC, 986 So. 2d 1286, 1265 (Fla. 2008)). The doctrine of in pari materia requires statutes relating to the same subject or object to be construed together to harmonize them and give effect to legislative intent. Florida Department of State, Division of Elections v. Martin, 916 So. 2d 763, 768 (Fla. 2005).

20. The parties spent much time and evidence on the issue of whether Respondent's statutory interpretation in this proceeding deviates from its statutory interpretation in the two previous cases. Petitioner argues that Respondent is bound by the interpretation in the earlier two cases under the doctrine of administrative stare decisis pursuant to the decision in Gessler v. Department of Business and Professional Regulation, 627 So. 2d 501, 503 (Fla. 4th DCA 1993).

21. As a threshold matter, the fact-finder finds that the two previous cases do not deviate from Respondent's statutory interpretation in this proceeding. Moreover, the Legislature may authorize administrative agencies such as Respondent to interpret, but never to alter statutes. Carver v. State of Florida, Division of Retirement, 848 So. 2d 1203, 1206 (Fla. 1st DCA 2003) (citing Cortez v. State Board of Regents, 655 So. 2d 132, 136 (Fla. 1st DCA 1995)). An administrative agency has statutory authority to propose only that agency action that implements or interprets the specific powers and duties granted by the enabling statute. § 120.52(8). The judicial doctrine in Gessler cannot be interpreted to require Respondent to take agency action in this proceeding that is inconsistent with Legislative authority in Subsection 212.08(5)(b).

22. Even if one or more of Respondent's rules were to authorize Respondent to deviate from the statutory authority in

Subsection 212.08(5)(b), rulemaking is authorized in furtherance of statutory authority and not to amend, expand, or enlarge statutory authority. Willette v. Air Products and Bassett and Department of Labor and Employment Security, Division of Workers' Compensation, 700 So. 2d 397, 399 (Fla. 1st DCA 1997). In Willette, the court wrote:

> Executive branch rulemaking is authorized in furtherance of, not in opposition to, legislative policy. Just as a court cannot give effect to a statute (or administrative rule) in a manner repugnant to a constitutional provision, so a duly promulgated rule, although "presumptively valid until invalidated in a section 120.56 rule challenge [citations omitted]," must give way in judicial proceedings to any contradictory statute that applies.

Id.

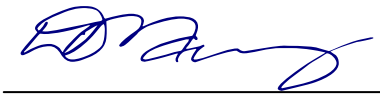
23. The separation of powers doctrine provides that no branch of government may encroach upon the powers of another and that no branch may delegate its power to another branch. Fla. Const., Art. II, § 3. The second prohibition is the non-delegation doctrine. Chiles v. Children A, B, C, D, E, and F, 589 So. 2d 260, 264-266 (Fla. 1991). Respondent must administer legislative programs pursuant to minimal standards and guidelines ascertainable by reference to statutory terms enacted by the Legislature. Id.

RECOMMENDATION

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

RECOMMENDED that Respondent enter a final order finding that Petitioner did not satisfy the requirement for a 10 percent increase in productive output defined in Subsection 212.08(5)(b) and Rule 12A-1.096, and denying Petitioner's request for a refund.

DONE AND ENTERED this 20th day of October 2009, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of October, 2009.

ENDNOTE

[1/] References to chapters, sections, and subsections are to Florida Statutes (2005) unless otherwise stated. References to rules are to rules promulgated in the Florida Administrative Code in effect on April 1, 2008).

COPIES FURNISHED:

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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.