STATE OF FLORIDA DEPARTMENT OF REVENUE
TALLAHASSEE, FLORIDA

TIMES PUBLISHING, CO. Petitioner, vs. FLORIDA DEPARTMENT OF REVENUE Respondent.	)	**DOR 10-01-FOF** DOAH Case Nos. 08-3938 08-3939

FINAL ORDER

This cause came before me, as Executive Director of the Florida Department of Revenue (the Department) for the purpose of issuing a Final Order. The Administrative Law Judge assigned by the Division of Administrative Hearings heard this cause and submitted a Recommended Order to the Department. A copy of the Recommended Order, issued on October 20, 2009, by Administrative Law Judge Daniel Manry (the ALJ), is attached to this order and is incorporated to the extent set forth herein. The Petitioner and Respondent timely filed exceptions to the Recommended Order, copies of which are also attached to this Final Order. Rulings on the Petitioner's and Respondent's exceptions are set forth below. For the reasons expressed herein, the Department adopts the recommendations of the ALJ and specifically incorporates the Recommended Order except for Finding of Fact 6 and Conclusion of Law 17, which are modified as set forth below.

RULINGS ON PETITIONER'S EXCEPTIONS

Petitioner's Exception to Finding of Fact 5

Petitioner's exception to paragraph 5 of the Recommended Order states that the finding is not based upon competent substantial evidence, and that the testimony of witnesses Cheryl

Collin and David Bayne and the exhibits introduced by the parties show that the Petitioner satisfied the requirement for a 10 percent (10%) increase in productive output.

In paragraph 5 of the Recommended Order, the ALJ finds that "[t]he issue of whether the 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 then states his conclusion that, as a matter of law, the Petitioner did not satisfy the 10 percent requirement. "Competent substantial evidence" is "such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred" and that is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." De Groot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957). Agencies are bound to honor a presiding officer's findings of fact when they are based upon competent substantial evidence. Section 120.57(1)(l), F.S. There is competent substantial evidence on the record to support this finding of fact by the ALJ.

Petitioner, in its exception, would also have the agency reweigh evidence that was presented to and ruled upon by the ALJ. Florida courts have specifically indicated that the Department is not authorized to do so:

> It is the hearing officer's function to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence. . . . The agency is not authorized to weigh the evidence presented, judge credibility of witnesses, or otherwise interpret the evidence to fit its desired ultimate conclusion.

Heifetz v. Department of Business Regulation, 475 So.2d 1277, 1281-1282 (Fla. 1st DCA 1985). For these reasons, Petitioner's exception to Findings of Fact 5 is rejected.

Petitioner's First Exception to Finding of Fact 6

Both Petitioner and Respondent except to the inclusion of the term "preprints" in Finding of Fact 6, in which the ALJ found that "Petitioner counts items identified in the record as of exceeding the 10 percent requirement in Subsection 212.08(5)(b)."

The record indicates that the term "preprints" are items not printed by Petitioner. Rather, "preprints" are printed by another party and delivered to Petitioner for insertion in Petitioner's newspaper. See Transcript, Vol. II, p. 150. As indicated by the parties in their exceptions, the record indicates that in the verification audit Petitioner did not rely on "preprints" in its proposed measure of increased production. Accordingly, the term should not have been included in Finding of Fact 6 or in Conclusion of Law 17. Finding of Fact 6 and Conclusion of Law 17 are therefore modified below to remove the term "preprints," in conjunction with the modifications regarding Respondent's First Exception to Finding of Fact 6.

Petitioner's Second Exception to Finding of Fact 6

Petitioner's second exception to Finding of Fact 6 appears to except to the operation of the doctrine of *in pari materia* – contending instead that the provisions of Sections 212.05(1)(b) and 212.08(5)(b), F.S., should be read and applied in isolation. The language of a particular provision in a statute must be read in the context of the entire statutory scheme. It is a basic rule of statutory construction that statutes that relate to the same or to a closely related subject or object are regarded as *in pari materia* and should be construed together and compared with each other to determine legislative intent. Ferguson v. State, 377 So.2d 709, 710 (Fla. 1979). Statutory construction is a question of law. Therrien v. State, 914 So.2d 942, 945 (Fla. 2005). The Department adopts and incorporates the Conclusions of Law in the Recommended Order below, as modified herein. Petitioner's contention is therefore rejected.

Petitioner's Exceptions to Findings of Fact 9 and 10

Petitioner, in its exceptions to Findings of Fact 9 and 10, would have the agency reweigh evidence that was presented to and ruled upon by the ALJ. As stated above in the ruling on Petitioner's exception to Finding of Fact 5, Florida courts have specifically indicated that the Department is not authorized to do so. See Heifetz v. Department of Business Regulation, 475 So.2d 1277, 1281-1282 (Fla. 1st DCA 1985). For this reason, Petitioner's exception to Findings of Fact 9 and 10 are rejected.

Respondent's First Exception to Finding of Fact 6

Respondent takes exception to the identification of Section 212.08(5)(1)(g), F.S., as the provision that provides that inserts are considered to be a component part of the newspaper. As Respondent indicates, this is clearly a typographical error, as the correct citation is Section 212.05(1)(g), F.S., and it is clear from the record that the parties and the ALJ were aware of the correct statutory reference. The same error occurred in Conclusion of Law 17.

Accordingly, and in conjunction with the ruling on Petitioner's exception to Finding of Fact 6, Finding of Fact 6 and Conclusion of Law 17 are therefore modified below to correct the statutory reference to Section 212.05(1)(g), F.S.

Respondent's Second Exception to Finding of Fact 6

Respondent's second exception to Finding of Fact 6 is addressed in the ruling on Petitioner's First Exception to Finding of Fact 6 and in the ruling on Respondent's First Exception to Finding of Fact 6, above.

Petitioner's Exceptions to Conclusions of Law 14, 15, 17, 18, 19, 20 and 21

Petitioner takes exception to Conclusions of Law 14, 15, 17, 18, 19, 20 and 21 in a single statement, providing only that "[b]y filing these exceptions to the conclusions of law contained in the recommended order, Petitioner seeks to express its disagreement with and avoid waiving any objection to those conclusions of law."

Section 120.57(1)(k), F.S., provides that "[a]n agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record."

Accordingly the Department declines to respond to the Petitioner's exceptions to these Conclusions of Law.

Adoption and Modification of the Recommended Order

The Statement of the Issue and the Preliminary Statement as set forth in the ALJ's Recommended Order are adopted in their entirety. The Department adopts and incorporates the Findings of Fact set forth in paragraphs 1 through 5 and 7 through 11 of the Recommended Order. The Department also adopts and incorporates the Conclusions of Law set forth in paragraphs 12 through 16 and 18 through 23 of the Recommended Order. Paragraph 6 of the Findings of Fact and Paragraph 17 of the Conclusions of Law are modified as set forth below.

Finding of Fact 6

It is an undisputed fact that Petitioner counts items identified in the record as "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 212.05(1)(g) for "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.

Conclusion of Law 17

Respondent construes the 10 percent exemption authorized in Subsection 212.08(5)(b) in para materia with the exemption authorized in Subsection 212.05(1)(g) for "custom inserts" and "circulation inserts" (hereinafter "inserts"). The latter statutory exemption treats inserts as a "component part of the newspaper."

The Recommended Order, subject to the modifications stated above, is adopted and attached below.

DONE AND ENTERED in Tallahassee, Leon County, Florida this 10th day of Feb., 2010.

STATE OF FLORIDA
DEPARTMENT OF REVENUE

Lisa Echeverri
Executive Director

CERTIFICATE OF FILING

I HEREBY CERTIFY that the foregoing FINAL ORDER has been filed in the official records of the Department of Revenue this 11th day of Feb, 2010.

Nancy Purvis
Agency Clerk

Any party to this Order has the right to seek judicial review of the Order pursuant to Section 120.68, Florida Statutes, by filing a Notice of Appeal pursuant to Rule 9.110 Florida Rules of Appellate Procedure, with the Agency Clerk of the Department of Revenue in the Office of the General Counsel, P.O Box 6668, Tallahassee, Florida 32314-6668, and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this Order is filed with the Clerk of the Department.

Copies furnished to:

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