STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GAMESTOP, INC.,	)	
	)	
Petitioners,	)	
	)	
vs.	)	Case No. 09-5759RX
	)	
DEPARTMENT OF REVENUE,	)	
	)	
Respondent.	)	
______________________________	)	

FINAL ORDER

Pursuant to notice, a formal hearing was held in this case on February 15, 2010, in Tallahassee, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUE

Whether subsections (1) and (2) of Florida Administrative Code Rule 12A-1.074 enlarge, modify or contravene the specific provisions of law implemented, or are arbitrary or capricious,

and thus constitute an invalid exercise of delegated legislative authority.

PRELIMINARY STATEMENT

On October 20, 2009, Petitioner GameStop, Inc. ("GameStop") filed a Petition to Determine the Invalidity of an Existing Rule, challenging Florida Administrative Code Rule 12A-1.074(1) and (2). The case was assigned to the undersigned and scheduled for hearing on November 19, 2009. On October 30, 2009, Respondent Department of Revenue (the "Department") filed a motion seeking to continue the hearing and to conduct out-of-state depositions via telephone. On November 4, 2009, GameStop filed a responsive pleading in opposition to both the continuance and the telephonic depositions. By Order dated November 5, 2009, the undersigned denied the motion to continue the hearing but granted the motion to conduct telephonic depositions.

On November 5, 2009, GameStop's current counsel entered their appearance and filed an unopposed motion to continue the hearing. The motion was granted by way of an amended notice of hearing re-scheduling the final hearing for February 15, 2010.

On November 17, 2009, GameStop filed a Motion for Leave to File an Amended Petition. The Department did not oppose the motion, which was granted by Order dated December 4, 2009.

GameStop filed its Amended Petition to Determine the Invalidity of an Existing Rule on December 4, 2009.

The Amended Petition alleges that subsections (1) and (2) of Florida Administrative Code Rule 12A-1.074 constitute an invalid exercise of delegated legislative authority because they enlarge, modify or contravene the specific provisions of the laws implemented, Sections 212.02(15) and (16) and 212.09(1) and (2), Florida Statutes. The Amended Petition also alleges that subsections (1) and (2) of Florida Administrative Code Rule 12A-1.074 are arbitrary or capricious.

On January 25, 2010, the parties filed a Joint Prehearing Stipulation. On February 2, 2010, GameStop filed a motion for summary final order. On February 8, 2010, the Department filed its written response in opposition to the motion, with the supporting affidavit of H. French Brown, IV.

At the outset of the final hearing, the parties agreed that there remained no issues of material fact, and that the case could proceed to decision based on GameStop's motion for summary final order, the Department's response, the agreed facts set forth in the Joint Prehearing Stipulation, and Mr. Brown's affidavit. The final hearing consisted of legal argument, with no live testimony presented and no exhibits offered into evidence.

The one-volume Transcript of the hearing was filed at the

Division of Administrative Hearings on February 24, 2010. The parties filed their Proposed Final Orders on March 8, 2010. All references are to the 2009 codification of Florida Statutes unless otherwise indicated.

FINDINGS OF FACT

Based on the stipulated facts and the uncontested affidavit of H. French Brown, IV, the following findings of facts are made.

1. The rule provisions at issue in this proceeding are subsections (1) and (2) of Florida Administrative Code Rule 12A-1.074, hereinafter referenced as "the Rule." The Rule provides:

> 12A-1.074 Trade-Ins.
>
> (1) Where used articles of tangible personal property, accepted and intended for resale, are taken in trade, or a series of trades, at the time of sale, as a credit or part payment on the sale of new articles of tangible personal property, the tax levied by Chapter 212, F.S., shall be paid on the sales price of the new article of tangible personal property, less credit for the used article of tangible personal property taken in trade. A separate or independent sale of tangible personal property is not a trade-in, even if the proceeds from the sale are immediately applied by the seller to a purchase of new articles of tangible personal property.
>
> (2) Where used articles of tangible personal property, accepted and intended for resale, are taken in trade, or a series of trades, at the time of sale, as a credit or part payment on the sale of used articles, the tax levied by Chapter 212, F.S., shall

> be paid on the sales price of the used article of tangible personal property, less credit for the used articles of tangible personal property taken in trade. A separate or independent sale of tangible personal property is not a trade-in, even if the proceeds from the sale are immediately applied by the seller to a purchase of new articles of tangible personal property.[1/]

2. The Rule states that it is intended to implement the following statutory provisions: Sections 212.02(15), 212.02(16), 212.07(2), 212.07(3), and 212.09, Florida Statutes.

3. Section 212.02, Florida Statutes, provides, in relevant part:

> 212.02 Definitions -- The following terms and phrases when used in this chapter have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:
>
> * * *
>
> (15) "Sale" means and includes:
>
> (a) Any transfer of title or possession, or both, exchange, barter, license, lease, or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration. . . .
>
> (16) "Sales price" means the total amount paid for tangible personal property, including any services that are a part of the sale, valued in money, whether paid in money or otherwise, and includes any amount for which credit is given to the purchaser by the seller, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service cost, interest charged,

> losses, or any other expense whatsoever. . . Trade-ins or discounts allowed and taken at the time of sale shall not be included within the purview of this subsection. . .

4. Section 212.07(2), Florida Statutes, set forth the method and manner by which a dealer is to charge and collect sales tax. Section 212.07(3), Florida Statutes, sets forth penalties for a dealer who fails to collect sales tax. Neither of these provisions affects the matters at issue in this proceeding.

5. Section 212.09, Florida Statutes, provides, in relevant part:

> 212.09 Trade-ins deducted; exception.--
>
> (1) Where used articles, accepted and intended for resale, are taken in trade, or a series of trades, as a credit or part payment on the sale of new articles, the tax levied by this chapter shall be paid on the sales price of the new article, less the credit for the used article taken in trade.
>
> (2) Where used articles, accepted and intended for resale, are taken in trade, or a series of trades, as a credit or part payment on the sale of used articles, the tax levied by this chapter shall be paid on the sales price of the used article less the credit for the used article taken in trade....[2/]

6. GameStop is a Minnesota corporation that is authorized to do business in the State of Florida, and a registered dealer for purposes of collecting and remitting sales and use tax to the Department.

7. GameStop is a publicly held international retailer of new and used video game hardware, software, and accessories, with over 6,000 stores worldwide, including stores in Florida. One of GameStop's customary business practices is to accept from its customers used gaming software, hardware, and accessories that the GameStop store manager determines is in resalable or re-furbishable condition.

8. In return for the used articles, a GameStop customer may choose among three options:

> Option 1: The customer may receive cash in exchange for the used items.
>
> Option 2: The customer may apply the value assigned to the item by the store manager as part payment toward the immediate purchase of another new or used item from GameStop.
>
> Option 3: The customer may receive a credit for the value of the used item, which may be used only toward the purchase of new or used items from GameStop at some time in the future.

9. If the GameStop customer elects Option 1, he receives 20 percent less value in the cash exchange than he would have received pursuant to the part payment offered by Option 2 or the credit toward a future purchase offered by Option 3.

10. For a customer who chooses Option 3, GameStop tracks outstanding credits by issuing to the customer an "EdgeCard." When the customer returns to a GameStop store and requests to apply credits toward the purchase of a new or used item, the GameStop salesperson can swipe the electronic strip on the back of the EdgeCard and learn the credit amount available to the customer.

11. The EdgeCard system merely tracks the amount of ongoing credits available to the customer. It does not record any request made by the customer to reserve or identify a specific item toward which the credits will later be used.

12. The credits on an EdgeCard never expire. Once the customer has chosen Option 3, he may go to a GameStop store or access the GameStop website at any time thereafter and apply the credit on his account toward the purchase of new or used items from GameStop.

13. GameStop also offers traditional gift cards that are purchased via cash or credit card rather than in exchange for used articles. Purchases made using a gift card or gift certificate are taxable for the full purchase price.[3/] When a customer uses a gift card to purchase an item at a GameStop store, GameStop does not reduce the taxable sales price by the amount of the credit or value stored on the gift card and used in the purchase.

14. GameStop assigns no redeemable cash value to the EdgeCard or to traditional gift cards.

15. GameStop does not allow a gift card to be used to store credits obtained through the exchange of used items, reserving that function exclusively to the EdgeCard. The value of a GameStop gift card can be redeemed only through the purchase of new or used items from GameStop.

16. Credits can be added to an EdgeCard only by turning over used articles to GameStop. A customer may not purchase credits. A credit on an EdgeCard can only be redeemed by the subsequent purchase of new or used items from GameStop.

17. The GameStop customer who selects Option 3 first submits his used game or item of hardware to the GameStop store, which assigns it a dollar value and credits that amount to the customer's EdgeCard account in exchange for the item. At some later date, the customer returns to the GameStop store and trades the credit stored on the EdgeCard for some used or new item. The customer may build up credits on the EdgeCard with any number of transactions over any length of time before trading in the credits for an item from GameStop. The customer is not required to identify the item toward which he wishes to apply his EdgeCard credits until the time he actually trades the credits for the item.

18. The Edge Card system replaced GameStop's former practice of requiring a customer who chose to obtain a credit for the submission of used articles to retain a cash register receipt showing the amount of the credit. This "paper credit" would then be redeemable toward the purchase of another item at a later date.

19. There is no expiration date on an EdgeCard, a gift card, or a paper credit.

20. GameStop does not replace the credits on a lost EdgeCard or a lost gift card.

21. For purposes of accounting, GameStop carries unredeemed EdgeCard credits on its books for a period of three years as customer liabilities. GameStop does the same for unredeemed value on gift cards.

22. GameStop continues to honor unredeemed EdgeCard credits and gift card values that are more than three years old, but no longer carries them on its books as customer liabilities.

23. Prior to 2007, for the purpose of collecting sales tax from its customers, GameStop deducted the value of EdgeCard or any paper credits used in the purchase of new or used items from the purchase price for the purpose of calculating sales tax due.

24. GameStop has remitted to the Department tax for the entire sales price of new or used items purchased from approximately January 2007 through August 31, 2007, in response

to an audit by the Department, without reducing the taxable sales price by the value of any EdgeCard or paper credits used.

25. GameStop has a return policy that allows a customer who is not satisfied with an item purchased from GameStop to return the item within a certain period of time and under certain conditions.

26. When a customer returns an item in compliance with GameStop's return policy, the customer receives full retail value back, including the amount of the tax paid on the original purchase. A customer who returns an item in compliance with GameStop's return policy can elect to receive the return value in the form of cash, as a reimbursement to the customer's credit card, or as value stored on a GameStop merchandise card. The GameStop merchandise card does not record credits received via the return of used articles.

27. The Department states that its historical administration and interpretation of the Rule and the statutes it implements do not strictly limit trade-in credits to a simultaneous exchange situation, or to transactions occurring within any particular time frame. However, the Department states that it does require the customer to identify the merchandise to be purchased with the EdgeCard credits at the time the credits are acquired. The Department does not consider the transaction to constitute a "trade-in" unless the item to be

purchased with the EdgeCard credits has been specifically identified by the customer at the time the customer first returned a used item to GameStop.

CONCLUSIONS OF LAW

28. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding pursuant to Section 120.56(1) and (3), Florida Statutes.

29. Section 120.56 provides in pertinent part:

> (1) GENERAL PROCEDURES FOR CHALLENGING THE VALIDITY OF A RULE OR A PROPOSED RULE.--
>
> (a) 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.
>
> (b) The petition seeking an administrative determination must state with particularity the provisions alleged to be invalid with sufficient explanation of the facts or grounds for the alleged invalidity and facts sufficient to show that the person challenging a rule is substantially affected by it, or that the person challenging a proposed rule would be substantially affected by it.
>
> * * *
>
> (3) CHALLENGING EXISTING RULES; SPECIAL PROVISIONS.--
>
> (a) A substantially affected person may seek an administrative determination of the invalidity of an existing rule at any time

> during the existence of the rule. The petitioner has a burden of proving by a preponderance of the evidence that the existing rule is an invalid exercise of delegated legislative authority as to the objections raised.

30. The parties have stipulated that GameStop has standing to bring this challenge to Florida Administrative Code Rule 12A-1.074. The stipulated facts established that GameStop is a registered dealer with the obligation to collect and remit sales tax from its Florida customers, and that as such GameStop is directly affected by the challenged rule. Thus, GameStop has standing to bring this rule challenge.

31. As the moving party asserting the affirmative by attacking the validity of an existing agency rule, GameStop in this case retains the burden of proof throughout the entire proceeding. § 120.56(3)(a), Fla. Stat. See also Beshore v. Department of Financial Services, 928 So. 2d 411, 414 (Fla. 1st DCA 2006); Espinoza v. Department of Business and Professional Regulation, 739 So. 2d. 1250, 1251 (Fla. 3d DCA 1999); Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977).

32. The party attacking an existing rule has the burden to prove that the Rule constitutes an invalid exercise of delegated legislative authority. Cortes v. State Board of Regents, 655 So. 2d 132, 135-136 (Fla. 1st DCA 1995). The standard of proof

is a preponderance of the evidence. See § 120.56(3)(a), Fla. Stat.

33. An Administrative Law Judge may invalidate an existing Rule only if it is an invalid exercise of delegated legislative authority. See § 120.56(1)(a) and (3)(a), Fla. Stat.

34. Section 120.52(8) defines "invalid exercise of delegated legislative authority" to mean:

> [A]ction 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. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational; or;
>
> (f) 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.

35. In the Amended Petition, GameStop alleged that subsections (1) and (2) of Florida Administrative Code Rule 12A-1.074 enlarge, modify or contravene the specific provisions of the laws implemented, and are arbitrary or capricious. In its proposed final order, GameStop narrowed its argument to an assertion that the Rule modifies and contravenes Section 212.09, Florida Statutes, and enlarges Section 212.02(16), Florida Statutes. However, GameStop did not abandon its contention that the Rule is arbitrary or capricious, which will be considered below.

36. The parties have agreed that neither Option 1 nor Option 2 set forth in Finding of Fact 8, supra, implicates the Rule. Under Option 1, no trade-in occurs because the customer is simply selling his used item to GameStop. Under Option 2, the value of the used item taken in trade is immediately applied to the purchase of a new item from GameStop. The Department agrees that where the trade-in occurs at the time of sale, the value of the trade-in is deducted from the selling price and thus not subject to sales tax. See § 212.02(16), Fla. Stat. See also Fla. Admin. Code Rule 12A-1.018(2)("Trade-ins or discounts allowed and taken at the time of sale are deducted from the selling price, and the tax is due on the net amount paid at the time of sale.").

37. The dispute concerns Option 3, in which the customer receives a credit for the value of the used item that may be applied toward the purchase of new or used items from GameStop at some time in the future via the EdgeCard device that counts the accumulating credits.

38. GameStop argues that the Rule operates to make the total purchase price taxable in these situations because the EdgeCard credit is not generated "at the time of sale" and because the credit is created as part of a "separate or independent" transaction from the final sale of new merchandise by GameStop to the customer. GameStop contends that this result

is contrary to the mandate of Section 212.09, Florida Statutes.

39. GameStop notes that Section 212.09 specifically provides for a tax credit where used articles are taken in "a series of trades," whereas the Rule restricts the credit to trades taken "at the time of sale." GameStop contends that the Rule's additional restriction operates to render Section 212.09 nugatory.

40. GameStop's reasoning is as follows. Section 212.02(16), Florida Statutes, defines "sales price" generally for purposes of Chapter 212, Florida Statutes. Under that definition, a trade-in or discount "allowed and taken at the time of sale" is not included in the sales price. As noted above, the parties agree that a trade-in occurring at the time of sale is deducted from the sales price and not subject to tax.

41. GameStop argues that in Section 212.09, Florida Statutes, the Legislature has enacted an entire statute specifically dealing with trade-ins that expands upon the general definition found in Section 212.02(16). The general definition simply refers to "trade-ins or discounts" that occur "at the time of sale." Section 212.09 does not address all trade-ins. It is limited specifically to "used articles, accepted and intended for resale." As to those specific articles, Section 212.09 expands the temporal limitation imposed by Section 212.02(16). The "at the time of sale" restriction no

longer applies because Section 212.09 allows for "a series of trades" to occur over time and to constitute creditable items against the price of the new article.

42. GameStop notes the basic rule of statutory construction that words used in a statute are to be given their plain meaning. Courson v. State, 24 So. 3d 1249, 1251 (Fla. 2009) ("One of the first rules of statutory construction is that the plain meaning of the statute is controlling."). See also Jackson County Hospital Corp. v. Aldrich, 835 So. 2d 318, 328-329 (Fla. 1st DCA 2002) ("In construing a statute, the plain meaning of the statutory language is the first consideration."). The plain language of Section 212.09 allows the deduction for "a series of trades," but the statute provides no definition for the term "series." Where the statute provides no definition, it is appropriate to refer to dictionary definitions when construing the statute in order to ascertain the plain and ordinary meaning of the words used therein. School Board of Palm Beach County v. Survivors Charter Schools, Inc., 3 So. 2d 1220, 1233 (Fla. 2009). One dictionary defines the word "series" to mean "a group or number of related or similar things, events, etc., arranged or occurring in a temporal, spatial, or other order of succession; sequence."[4/] Another dictionary defines the term as "a number of things or events of

the same class coming one after another in spatial or temporal succession."[5/]

43. GameStop argues that the definition of "series" naturally contemplates that "a series of trades," all properly credited against the price of the purchased article, will occur in succession over a period of time. There can be no other meaning to the term "a series of trades." GameStop contends that the Rule improperly conflates the two statutes it purports to implement. The Rule appends the "at time of sale" language of Section 212.02(16) to the criteria of Section 212.09, with the absurd result that credit is allowed only if the "series of trades" contemplated by Section 212.09 all somehow occur "at the time of sale."

44. GameStop further argues that the Rule's statement that a "separate or independent sale of tangible personal property is not a trade-in" effectively prevents a deduction where there is a series of transactions that begins with one or more used articles being turned in to the merchant for a cumulative credit against the eventual purchase of a new item. GameStop asserts that the plain language of Section 212.09 contemplates and allows such a deduction.

45. GameStop is correct that, by limiting trade-in deductions to those trades occurring "at the time of sale," the Rule effectively negates Section 212.09. If the only allowable

trade-ins are those occurring "at the time of sale," then the general definition of Section 212.02(16) is entirely sufficient; Section 212.09 has no independent effect and is statutory surplusage.[6] It is impermissible for the Department to ignore, and thereby effectively eliminate, statutory terms used by the Legislature. It is an "elementary principle of statutory construction that significance and effect must be given to every word, phrase, sentence, and part of the statute if possible, and words in a statute should not be construed as mere surplusage." Survivors Charter Schools, 3 So. 3d at 1233, quoting Gulfstream Park Racing Association v. Tampa Bay Downs, Inc., 948 So. 2d 599, 606 (Fla. 2006).

46. Section 212.02, Florida Statutes, provides: "The following terms and phrases when used in this chapter have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning." The definition of "sales price" in Section 212.02(16) thus stands as the general definition of the term, including as that term is used in Section 212.09, Florida Statutes. Section 212.09's description of what is to be deducted from the "sales price" must be read to mean a deduction other than that which is already deducted by operation of Section 212.02(16): a trade-in taken at the time of sale. By adding the phrase "at the time of sale" to the Rule, the Department has limited the deduction to

that authorized under Section 212.02(16). By making no provision for the additional deduction mandated by Section 212.09, the Department has modified and contravened the provisions of that statute.

47. The Legislature included the term "at the time of sale" in Section 212.02(16), and did not include the term in Section 212.09. "[T]he presence of a term in one portion of a statute and its absence from another argues against reading it as implied by the section from which it is omitted." St. George Island, Ltd. v. Rudd, 547 So. 2d 958, 961 (Fla. 1st DCA 1989). The Rule operates to import "at the time of sale" into Section 212.09, a change that would render Section 212.09 an unnecessary and ineffective restatement of Section 212.02(16). See State v. Mark Marks, P.A., 698 So. 2d 533, 541 (Fla. 1997)(legislative use of different terms in different portions of the same statute is strong evidence that different meanings were intended).[7]

48. According to GameStop, the only construction that gives meaning to all of the statutes implemented by the Rule is that the taxable sales price must include a deduction both when an item is traded in and the value is immediately applied to a sale, and when the customer purchases a new or used item using credit previously obtained from a "series of trades" of used items. GameStop's argument is persuasive that the inclusion of "at the time of sale" in the Rule constitutes an effective

modification and contravention of Section 212.09, Florida Statutes.

49. Finally, GameStop argues that the Rule improperly expands the Department's taxing authority through the addition of the restriction that "a separate or independent sale of tangible personal property is not a trade-in, even if the proceeds from the sale are immediately applied by the seller to a purchase of new articles of tangible personal property." The exclusion of these "separate or independent sales" from the deduction serves to negate the statutory mandate that the deduction be calculated when there has been a series of trades. GameStop notes that the Department lacks the power to enact a rule restricting deductions that are specifically provided for by statute. Golden West Financial Corporation v. Department of Revenue, 975 So. 2d 567, 571-572 (Fla. 1st DCA 2008). For reasons stated below, this portion of GameStop's argument is not persuasive.

50. In defense of the Rule, the Department states that the real controversy in this matter arises from a dispute over the meaning of the terms "taken in trade" and "trade-in," which appear both in the Rule and in the statutes implemented by the Rule. The Department states that the Rule does not preclude credit for a "series of trades," if they constitute a "bona fide" trade-in transaction. According to the Department,

GameStop's analysis is focused on the definition of "series," but does not adequately address the definition of "trade" or "trade-in."

51. Dictionary definitions of the term "trade-in" refer to merchandise accepted as payment or part payment for another item of merchandise. Webster's Ninth New Collegiate Dictionary (1985) defines the term "trade-in" to mean "an item of merchandise (as an automobile or refrigerator) taken as payment or part payment for a purchase." The American Heritage Dictionary of the English Language, Third Edition (1992) defines the "trade-in" as: "merchandise accepted as partial payment for a new purchase; a transaction involving such merchandise." The Department points to these standard definitions and observes that the term "trade-in" does not include intangible "credits" arising from earlier sales transactions which are "separate or independent" from the purchase.

52. The Department's position is that unless the new item to be purchased is identified at the time the used item is turned in for an EdgeCard credit, nothing has been "traded" under the ordinary meaning of "trade-in." Therefore, purchases made with EdgeCard credits would not fall under the plain and ordinary meaning of a "trade-in" because the credits did not arise from an exchange involving an identified purchase.

53. The Department's view of "trade-in" is unduly restrictive, adding a requirement of simultaneity that is not present in the dictionary definitions. The definitions cited by the Department place no temporal restrictions on the transactions. The definition in Webster's Ninth New Collegiate Dictionary provides that a trade-in is "an item of merchandise taken as payment or part payment for a purchase." The definition does not require that the purchase occur simultaneously with the taking of the item in payment.[8/] Nothing in the dictionary definition of "trade-in" necessarily excludes the EdgeCard credit.

54. The relevant definition of the term "sale" is found at Section 212.02(15)(a), Florida Statutes: "Any transfer of title or possession, or both... of tangible personal property for a consideration." The Department contends that the tender of used items for EdgeCard credit does not constitute part of a future "sale" because possession of the item to be purchased with the EdgeCard credit does not transfer to the customer at the time of tender. According to the Department, EdgeCard credits cannot be part of any future sale unless there is an identification of the item to be acquired in trade, at the time that the trade-in is "allowed and taken."

55. For example, if a customer delivered used games to GameStop for EdgeCard credits, and then a year later decided to

purchase a new game using those credits, these transactions would not constitute a "trade-in" or an item "taken in trade" within the "normal and customary" understanding of those phrases. The item eventually purchased might be a new release that did not even exist at the time the used games were tendered to GameStop. The customer might never make a subsequent purchase, meaning there would never be a "trade-in" at all. The acquisition of EdgeCard credits, and the purchase of merchandise a year later, would be "separate or independent transactions,"[9/] not trade-ins, because the future sale was not identified at the time the trade-in was taken. The Department argues that the pertinent statutes impose this restriction by allowing deductions only for items "taken in trade" or constituting a "trade-in." The Rule merely implements and clarifies this statutory scheme.

56. The Department goes on to argue that the Rule does not preclude a "series of trades" from constituting a trade-in. If the new or used item to be purchased with the "series of trades" is identified, then each item returned to GameStop for credit during the series of transactions may be treated as a bona fide trade-in. Under the Rule, there can still be a series of trades, but there must be an individually identifiable sales transaction to which each such trade-in was tendered and is to be applied. The Department states that if GameStop would modify

its system to match used videos and games returned to GameStop with identified new items to be purchased with the EdgeCard credits, as in a lay-away plan, then the "series of trades" would be treated by the Department as a bona fide trade-in under the Rule.

57. The Department's argument is not persuasive. It begins with the flawed assumption that the definition of "trade-in" requires that the exchange of a used for a new item occur simultaneously. As noted in Conclusion of Law 52, supra, this assumption is not supported by the very dictionary definitions cited by the Department.

58. The Department claims that the EdgeCard credits cannot be part of a future "sale" because the customer does not take possession of the new item at the time he obtains the credit. This claim is based solely on the "allowed and taken at the time of sale" language in Section 212.02(16), without reference to the "series of trades" language of Section 212.09 that expands the temporal reach of the trade-in process.

59. First, the Department first asserts a problem: no trade-in can occur because possession of the item to be purchased with the EdgeCard credit does not transfer to the customer at the time the credit is obtained. Next, the Department proposes a solution that does not address the asserted problem. Even if the customer identifies the specific

item to be acquired in trade, he still has not taken possession of the item. Despite having identified the new or used item he intends to purchase, the customer may never take possession of the item and may never use the EdgeCard credits at all. The manufacturer may cease production of the identified item before the customer is able to purchase it using his EdgeCard credits.

60. By entering the EdgeCard program and accumulating credits, the customer has made a commitment to purchase some new item from GameStop in the future. He may not use the credits anywhere other than at a GameStop store or the GameStop website. The Department has failed to explain the significance of forcing this customer to identify the particular item he intends to purchase from GameStop, aside from the irrelevant observation that the transaction would then more closely resemble a layaway plan.[10/] The Department's position is supported only by a strict reading of Section 212.02(16), Florida Statutes, in isolation. Like the Rule itself, the Department's argument affords no significance to Section 212.09, Florida Statutes.

61. The Department disputes GameStop's contention that the Rule renders inoperative the "series of trades" language of Section 212.09, Florida Statutes. The Department contends that the Rule permits a series of trades to be used as a trade-in towards a purchase of one or more items of tangible personal property, but only when the trade-in articles are tendered

toward the purchase of an identifiable item of tangible personal property. If the used articles are not tendered toward any particular, identifiable item, then they are being sold for credits, not traded-in. EdgeCard credits themselves are not "merchandise" and therefore could not be turned in to constitute a "trade-in" within the plain and ordinary meaning of the term.

62. The Department again fails to explain the legal or practical significance of identifying the item of tangible personal property to be purchased. According to the Department's own theory, no "trade-in" can occur absent the transfer of possession of the new item; the trade-in must be "allowed and taken at the time of sale." However, the customer does not take possession of a new item by merely identifying it, meaning that the Department's proposed solution does not solve the Department's problem. The Department's position that the customer has "sold" his used items for credits might be more persuasive if those credits had value anywhere besides GameStop.[11/] The EdgeCard commits the customer to use the credits for the used items to purchase an article of tangible personal property at GameStop. The Department gives no persuasive reason for requiring the extra step of identifying the particular item of tangible personal property prior to purchase.

63. The Department considers the EdgeCard to be a type of cash equivalent, analogous to a gift card. Florida Administrative Code Rule Section 12A-1.089 treats the purchase of a gift card as non-taxable, with the subsequent use of the gift card being fully taxable. It is the Department's position that the EdgeCard as currently used by GameStop is a gift card to be treated under the gift card rule, rather than a means for recording a series of bona fide trade-ins.

64. The Department notes the following "close similarities" between the EdgeCard and a traditional gift card: neither has an expiration date; neither is replaced if lost; each can only be used to purchase in-store merchandise; neither has a redeemable cash value; and each is reported for three years by GameStop as a customer liability.

65. The Department fails to note a significant dissimilarity between the EdgeCard and the traditional gift card: the credits on the EdgeCard are obtained not through cash purchases but through the return of used items. It is safe to assume that as to most if not all of these used items, the original purchaser paid sales tax when he bought the item. Though neither party discussed the issue, as a matter of common sense it appears that some part of the justification for allowing the sales tax exemption on trade-ins is that in most cases the customer has already paid tax on the item traded in.

Unlike the traditional gift card, with the EdgeCard there is a sense that taxing a credit derived from the return of a used item might constitute double taxation.

66. The Department contends that these disagreements over what constitutes a bona fide "trade-in" and what constitutes a "gift card" concern the validity of the Department's application of the Rule to a particular set of facts, not the validity of the Rule itself. The Department states that "nothing in the Rule creates a presumption that EdgeCard transactions constitute "trade-ins" or that they do not. Likewise, nothing in the Rule creates a presumption whether the EdgeCard is a gift card or not. There are no examples in the Rule as to what constitutes a bona-fide trade-in and what does not. There are no examples in the Rule as to what constitutes a gift card and what does not. Therefore, the Rule does not appear to prejudice [GameStop] in any way when asserting its various legal arguments in any future assessment challenge [pursuant to Section 72.011, Florida Statutes.]" Whether any particular transaction is a "trade-in" or a "separate or independent sale" is a question of fact to be determined in the assessment challenge.

67. The Department's position is that the Rule does not create any presumptions as to which transactions are to be considered "separate or independent sales." The Rule merely states that the determination of whether the transactions are

"separate or independent sales" must be made. Thus, the Rule imposes no additional burden beyond what is already in the statutory requirement that there must be a bona fide "trade-in."

68. The Department's defense of the "at the time of sale" language of the Rule is not persuasive. The Department's reliance on its narrow interpretation of the dictionary definition of "trade-in" would at least be logical if it took the position that the EdgeCard program is untenable under the Rule and the implemented statutes: only merchandise exchanged for merchandise at the time of sale can constitute a trade-in; credits can never constitute a trade-in; therefore, the entire concept of the EdgeCard fails to meet the criteria for an exemption from sales tax.

69. However, the Department understands that the only way to save the Rule is to reconcile "at the time of sale" with "a series of trades." In the attempt to effect this reconciliation, the Department has amended the "merchandise for merchandise" requirement and pronounced that the Rule is satisfied by "merchandise for the promise of specific, identified merchandise." If the GameStop customer has identified the specific item of merchandise to which he intends to apply his EdgeCard credits, he may engage in a series of trade-ins prior to making the actual purchase of the new item.

70. As set forth at length above, the Department's "identify the merchandise" scheme does not even satisfy its own objections to the EdgeCard system. Further, from the customer's viewpoint, nothing in the language of the Rule would permit a taxpayer to infer that he might lessen his sales tax liability by identifying the specific item he intends to purchase at some time in the future with his accumulated EdgeCard credits. An agency's interpretation of its own rule is entitled to great deference. Citizens of the State of Florida v. Wilson, 568 So. 2d 1267, 1271 (Fla. 1990). However, such deference is not required where the agency's interpretation is clearly erroneous. Miles v. Florida A&M University, 813 So. 2d 242, 245 (Fla. 1st DCA 2002).

71. In this instance, the Department is not interpreting the Rule so much as adding criteria that are not discoverable in the Rule's text. When the Department "interprets" its Rule to mean something other than what the plain language of the rule states, it acts in an arbitrary fashion.[12] Such deviation from the text of the Rule violates a foundational principle behind the Administrative Procedure Act, that "an agency cannot change its standards at the personal whim of a bureaucrat." Courts v. Agency for Health Care Administration, 965 So. 2d 154, 159 (Fla. 1st DCA 2007).[13/]

72. The Department ignores the contradiction that makes compliance impossible for a taxpayer in GameStop's position: that the statutory term "a series of trades" cannot have any independent meaning if the "series of trades" can only be performed "at the time of sale." GameStop has offered a reasonable reading of the statutes that harmonizes the provisions of Section 212.02(16), Florida Statutes, with those of Section 212.09, Florida Statutes. The Department's reading of the statutes has resulted in a Rule that, if limited to its plain language, effectively negates Section 212.09, Florida Statutes.

73. The Department's defense of the "separate or independent sale" language of the Rule is adequate. The Department interprets this language as a way of explaining the statutory terms "taken in trade" and "trade-in," by offering an example of what is not a trade-in. Stripped to its essentials, the sentence in question states, "A sale is not a trade-in." This language is not necessarily illuminating or even helpful. It is very nearly tautological. However, standing alone, it is not in conflict with the statutes implemented by the Rule.[14/]

74. For the reasons explained above, it is concluded that the Rule contravenes, modifies and enlarges upon the Department's statutory authority. In particular, the Rule

modifies and contravenes the provisions of Section 212.09, Florida Statutes.

75. The Department has acted arbitrarily in "interpreting" the Rule in a way that is at odds with the Rule's plain language as regards the "identify the merchandise" requirement. However, absent the Department's arbitrary insertion of a nonexistent provision, it cannot be concluded that the Rule itself is arbitrary or capricious.

ORDER

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

ORDERED that Florida Administrative Code Rule 12A1.074(1) & (2) constitutes an invalid exercise of delegated legislative authority within the meaning of Section 120.52(8)(c), Florida Statutes.

DONE AND ORDERED this 4th day of May, 2010, in Tallahassee, Leon County, Florida.

LAWRENCE P. STEVENSON
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Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of May, 2010.

ENDNOTES

[1/] Subsection (3) of Florida Administrative Code Rule 12A-1.074 provides:

> (3) When title or possession of tangible personal property is transferred for a consideration other than cash, the property transferred is taxable at its full retail value. See Section 212.02(16), F.S. For example, a lumber dealer who trades some lumber for real property must collect tax from the former owner of the real property. If he fails to do so, he is liable for payment of the tax himself under Section 212.07(2), F.S.

Subsection (3) was not challenged by GameStop and is not at issue in this proceeding.

[2/] Subsection (3) of Section 212.09, Florida Statutes, establishes an exception for a non-dealer in the sales of aircraft, boats, mobile homes, or vehicles. It is not relevant to this proceeding. Throughout this Recommended Order, citations to "Section 212.09" will be understood to reference only subsections (1) and (2) of that statute.

[3/] Florida Administrative Code Rule 12A-1.089 provides, in relevant part:

> The sale of a gift certificate is not taxable. When the owner of a gift certificate redeems it for tangible personal property, or a part thereof, the transaction is taxable as a sale. For example, if the owner of a gift certificate valued at $25 purchases a $15 pair of shoes, tax of 90 cents must be collected by the dealer and remitted to the Department of Revenue....

[4/] Dictionary.com Unabridged, based on the Random House Dictionary (2010).

[5/] Merriam-Webster On-Line Dictionary (2010), found at www.merriam-webster.com/dictionary.

[6/] GameStop further observes that the Department has adopted an entirely separate rule that implements Section 212.02(16) with respect to those trade-ins that are immediately applied to the purchase of a new item. Fla. Admin. Code R. 12A-1.018(2), the text of which is set forth at Conclusion of Law 36, supra. GameStop notes that by grafting onto the Rule the phrase "at the time of sale" and adding the "separate or independent" exception, the Department has not only eliminated the additional tax exemption required by Section 212.09, but also adopted a rule that merely duplicates the effect of Florida Administrative Code Rule 12A-1.018(2).

[7/] The Department observes that the "series of trades" language of Section 212.09 dates back to the original enactment of the Florida Revenue Act in 1949. Section 9, Chapter 26319, Laws of Florida 1949. The "at the time of sale" language in Section 212.02(16) was enacted later, in 1965. (The Department provided no citation to support this statement, which was unchallenged by GameStop. The statutory history of Section 212.02 indicates that it was amended three times in 1965: Sections 1-3, Chapter 65-329; Section 5, Chapter 65-371, and Section 2, Chapter 65-420, Laws of Florida.) The Department argues that any conflict between the two statutes should be resolved by finding the most recent revision controlling. However, GameStop correctly observes that the principle cited by the Department applies only where two statutes are so unavoidably in conflict that there is no reasonable interpretation that gives them both meaning. Jordan v. Food Lion, Inc., 670 So. 2d 138, 140 (Fla. 1st DCA 1996). In this case, GameStop has proposed a reasonable construction of Sections 212.02(16) and 212.09 that gives harmonious meaning to both statutes.

[8/] The Department's subsequent analysis appears to acknowledge this lack of definitional support by making reference to the "normal and customary understanding" or the "common and ordinary meaning" of the term "trade-in." The Department is undoubtedly correct that it is more common than not for a trade-in to occur at the same time as the purchase. However, the Rule and the Department's defense thereof fail when they insist that the trade-in must occur in this way. Section 212.09, Florida Statutes, clearly contemplates "a series of trades" occurring

over time, and the dictionary definitions of "trade-in" do not contradict the statute.

[9/] This is the Department's language, derived from the Rule's "separate or independent sale" language. The Department considers each transaction in the accumulation of credits on an EdgeCard to constitute a "separate or independent sale" rather than a "series of trades" leading to a tax credit for the trade-in.

[10/] "Irrelevant" because the Department can point to no current statute or rule defining "layaway plan" that would provide a principled distinction supporting the Department's insistence that the item to be purchased be identified at the time the EdgeCard credits are obtained.

[11/] Though the stipulated facts did not perfectly explain the program, it appears that the EdgeCard is identified to the particular customer, and only that customer may use the credits on that card. The Department's "sale for credits" argument would clearly have more force if the EdgeCards were fungible and a secondary market for them were to develop.

[12/] It is understood that agency rules are often so complex as to defeat ready interpretation by a layperson, and that highly technical terms may carry meaning beyond their plain language. However, in this instance, the Department's proffered interpretation is entirely dehors the Rule.

[13/] This conclusion should not be read as indicating that the Department lacks the statutory authority to adopt a rule expressly requiring the customer involved in a "series of trades" to identify the specific item he intends to purchase from the merchant. That issue is not before this tribunal. The conclusion is simply that it is arbitrary for the Department to cite the present Rule as grounds for imposing such a requirement, where the language of the Rule says no such thing.

[14/] This conclusion should not be read as an endorsement of the Department's position that the accumulation of EdgeCard credits constitutes a series of "separate or independent sales." The uses to which the Department might put the "separate or independent sale" language in an assessment challenge brought by GameStop is not at issue in this rule challenge proceeding. The Rule is not invalidated by the Department's possibly erroneous interpretation of it.

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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 agency 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.