

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

SOUTHEAST PETRO DISTRIBUTORS, INC.,

Petitioner,

vs.

Case No. 19-5900

DEPARTMENT OF REVENUE,

Respondent.

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RECOMMENDED ORDER

On July 30, and August 4, 2020, Administrative Law Judge Lisa Shearer Nelson of the Florida Division of Administrative Hearings conducted a hearing pursuant to section 120.57(1), Florida Statutes (2019). The hearing was conducted by video teleconference with sites in Lauderdale Lakes and Tallahassee, Florida, on July 30, and by Zoom technology on August 4, 2020.

APPEARANCES

For Petitioner: Gerald J. Donnini II, Esquire  
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For Respondent: John Mika, Esquire  
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STATEMENT OF THE ISSUES

The issues to be determined are whether Southeast Petro Distributors, Inc. (Petitioner or Southeast Petro), is entitled to a refund for taxes paid on its purchases of identified machinery and equipment based upon an exemption in section 212.08(5)(b), Florida Statutes; and, if so, whether Southeast Petro is entitled to statutory interest on the amount of any refund paid, pursuant to section 213.255, Florida Statutes.

PRELIMINARY STATEMENT

On August 22, 2018, the Department of Revenue (Respondent or the Department) issued a Notice of Reconsideration to Southeast Petro. In the Notice of Reconsideration, the Department notified Southeast Petro that it was not entitled to a refund as a new or expanding business, for sales and use taxes paid during the period of May 2014 through April 2017, related to the purchase of dispensing pumps and underground tanks. Petitioner filed a Petition for Chapter 120 Hearing on October 19, 2018, and on November 6, 2019, the matter was forwarded to the Division of Administrative Hearings for the assignment of an administrative law judge. The case was assigned to Judge W. David Watkins, and on November 13, 2019, a Notice of Hearing was issued, scheduling the case for hearing on January 7, 2020.

On December 23, 2019, Southeast Petro filed an Unopposed Motion to Continue Final Hearing, based on an unexpected death in counsel's family. The continuance was granted, and the case was rescheduled for hearing on

March 20, 2020, by video teleconference. On January 22, 2020, the case was transferred to the undersigned.

Respondent requested Official Recognition of the House Staff Analysis of HB 3229 (June 7, 1998), and of the refund application, known as Form DR-26, which is incorporated by reference into Florida Administrative Code Rule 12-26.008. On February 26, 2020, both requests were granted.

The parties filed a Pre-Hearing Stipulation on March 10, 2020. The Pre-Hearing Stipulation included stipulated facts for which no evidence at hearing was necessary. Those stipulated facts have been incorporated into the Findings of Fact below.

On March 18, 2020, Respondent filed an unopposed motion to continue the final hearing, citing the COVID-19 pandemic that required that public gatherings cease and non-essential activities be delayed nationwide. An Order Granting Continuance was issued the same day, which directed the parties to file a Joint Status Report by April 20, 2020, providing new, mutually acceptable dates for rescheduling the hearing. The timely response filed requested additional time to provide dates, due to the continued uncertainty related to the spread of COVID-19. The request was granted by Order dated April 20, 2020, giving the parties until June 5, 2020.

After receiving dates from the parties, the case was rescheduled for July 30, 2020, by video teleconference, with sites in Tallahassee and Lauderdale Lakes, Florida. The case commenced but additional time was required to complete the testimony, so the proceeding resumed using Zoom technology on August 4, 2020.

At hearing, Summit Shah testified on behalf of Petitioner, and Petitioner's Exhibits 1, 22 through 36<sup>1</sup>, 38 through 44, and 46 through 52 were admitted into evidence. Kevin Hummel and Alan Fulton testified for the Department, and Respondent's Exhibits numbered 1 through 22 and 24 were admitted into evidence. The Department also renewed its Motion to Dismiss, which had been denied by Judge Watkins before the case was reassigned. The motion is denied.

The Transcripts of the proceedings were filed with the Division on August 19, 2020. The parties requested and received 30 days from the filing of the Transcripts to file their proposed recommended orders. Both submissions were timely filed and have been carefully considered in the preparation of this Recommended Order. However, Southeast Petro had two charts attached to its Proposed Recommended Order that were not identified as exhibits in this case. Those charts have not been examined or considered in preparing the Recommended Order. Unless otherwise indicated, all references to Florida Statutes are to those in effect during the refund period. *See State ex rel. Szabo Food Svcs., Inc v. Dickinson*, 286 So. 2d 529 (Fla. 1973).

#### FINDINGS OF FACT

Based on the testimony and documentary evidence presented, the demeanor of the witnesses, and the stipulations of the parties, the following facts are found:

1. Southeast Petro is a fuel distributor that distributes fuel to customers in the Southeastern United States, concentrated mostly in Florida. Southeast Petro does not operate any of the locations to which it delivers fuel, but the operators of many of the locations, like Southeast Petro, are affiliate

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<sup>1</sup> Petitioner's Exhibit 22 is for demonstrative purposes only.

companies of M&R High Point Holdings, Inc. Summit Shah is the President of Southeast Petro and has been with the company for 22 years. He referred to these affiliate companies as “disregarded entities,” and testified that the companies are part of a family business, with all of the same officers and common ownership under a single federal tax return. Those other than Southeast Petro are referenced in this Recommended Order as affiliate sites. Southeast Petro also delivers fuel to locations in which it has no ownership interest. For these locations, which are referred to as dealer locations, Southeast Petro has entered into Dealer Supply Agreements. Under these agreements, Southeast Petro supplies not only the fuel to the dealers, but equipment to store and dispense the fuel, including gasoline tanks and dispensing pumps. While ownership of the fuel passes to the dealer when it is transferred to the storage tanks, the storage tanks, dispensing pumps, and related equipment remain the property of Southeast Petro. Southeast Petro is required to supply fuel to the dealer as necessary to meet customer demand.

2. Southeast Petro purchases the underground tanks and dispensing pumps for both its affiliate sites and the dealer locations that buy its fuel. Fuel tanks generally last approximately 20 years, and have warranties for 10-20 years, while dispensing pumps last about 10 years, with most warranties lasting for four years. Both the dispensing pumps and the underground storage tanks have a depreciable life of over three years. As the pumps age, they become less efficient and the flow of the gasoline slows. This case involves the replacement of dispensing pumps and a few underground storage tanks at gas stations serviced by Southeast Petro.

3. Most gas stations sell unleaded gasoline with three octane ratings: premium, with a 93 rating; mid-grade, with an 89 rating; and regular unleaded, with an 87 rating. Different vehicles require different fuel octane levels to maximize the performance of the vehicle. For example, a high performance sports car requires premium gas, while a typical sedan runs just fine on regular unleaded gasoline.

4. At one time, an underground tank was required for each kind of fuel. However, within the last approximately 20 years, dispensing pumps have been manufactured with a blender mechanism that allows for the elimination of one storage tank and blends percentages of unleaded and premium fuel to create mid-grade fuel at the dispensing location. With the use of this type of dispensing pump, the need to transport and store mid-grade fuel is eliminated. Reducing the number of tanks required at each location reduces cost of insurance, as well as the cost related to supplying the tanks, and the risk of fuel leaks from the underground tanks.

5. The Department contends that while Southeast Petro is purchasing these dispensing pumps with the blender capability, it is the customer, as opposed to Southeast Petro, that is “making” the mid-grade fuel through his or her selection of mid-grade when making the fuel purchase. However, unless the dispensing pump is equipped with the mechanism that blends the fuel, the customer cannot access mid-grade fuel.

6. On or about May 22, 2017, Southeast Petro filed a DR-26S, Application for Refund – Sales and Use Tax form (application), with the Department, claiming that it was entitled to a refund of \$146,846.47 in sales tax paid for dispensing pumps and underground storage tanks it purchased to replace the dispensing pumps and tanks at several locations. The purchases were for dispensing pumps for both affiliated entities and for dealer locations. The replacement of some underground storage tanks was also included in the claimed purchases. Dispensing pumps were purchased from Central Industries, Inc.; Guardian Fueling Technologies, LLC; and Sunoco, LLC, and underground storage tanks were purchased from Modern Welding Company of Florida, Inc.

7. In addition to the application, Petitioner provided a power of attorney form, a spreadsheet listing job code, invoice date, invoice number, taxable amount, sales tax, sales tax percentage, and invoice totals for the purchases at issue; and several invoices for purchases of gasoline pumps, tanks, and

related hardware necessary for installation. The invoices reflect the different sites to which pumps were installed. At least some portion of the address for the site was included on the invoices, such as the street address, although they did not always identify the cities where the sites were located.

8. The refund period in the application is May 2014 through April 2017.

9. On June 20, 2017, the Department issued a Notice of Intent to Make Tax Refund Changes. In an attachment to the Notice, the Department stated that the information provided in the request for refund was insufficient, and requested that Petitioner provide an assignment of rights to refund of sales tax form; a plant schematic of the manufacturing facility identifying the location of the equipment included in the refund request; citations to applicable Florida Statutes and administrative rules upon which Petitioner was relying for the request for exemption and refund, along with any documentation (not specified) required to support the exemption/refund request; and information related to the claimed pollution control exemption, which is no longer relevant to these proceedings.

10. The Notice of Intent to Make Refund Changes stated, "If you do not agree with these findings, you may request an informal conference to discuss any factual, statutory, or regulatory issues related to the above refund denial. Your request for informal conference must be made, in writing, to the above referenced office within 30 days of the issuance of this Notice." It also advised that if the taxpayer did not request an informal hearing within 30 days, a Notice of Proposed Refund Denial would be issued on or about July 20, 2017. The attachment requesting additional documents did not expressly state a deadline for the submission of the documents requested.

11. On July 20, 2017, the Department issued a Notice of Proposed Refund Denial for the Refund Claim. The attachment to the Notice of Proposed Refund Denial stated that the request for refund was being denied because the documentation requested in the Notice of Intent to Make Tax Refund Changes had not been provided.

12. Southeast Petro timely protested the Notice of Decision of Refund Denial pursuant to Florida Administrative Code Chapter 12-6. Southeast Petro's Protest letter, dated August 2, 2017, included the documents previously provided to the Department. No plant schematic identifying the equipment included in the refund request was ever provided to the Department, or produced at hearing, because no plant is involved. Instead, Petitioner asserts that each gas station is a fixed site where "manufacturing, processing, compounding, or producing for sale" is taking place.

13. On November 17, 2017, Alan Fulton, who at that time was a tax law specialist for the Department, issued a letter to counsel for Petitioner stating that the documentation to date was not sufficient to support the claim, and that the Department needed, for each transaction/refund amount requested, a properly executed assignment of rights form from each of the selling dealers to which Petitioner asserts was paid in error; the amount of tax requested for each transaction in the refund claim; a clear and concise reconciliation of the invoices/transactions for which Petitioner was seeking a refund; and proof of tax paid to the vendor that reconciles to the refund amount. Mr. Fulton also asked for production records or documents to support the claim that the machinery and equipment purchased is used in a manufacturing process to produce a new product; and a thorough description of the manufacturing process, including the specific machinery used. Mr. Fulton advised that this information, as well as any other documentation that may support the protest, needed to be provided to the Department no later than December 12, 2017.

14. On February 28, 2018, the Department issued a Notice of Decision (NOD) of Refund Denial, in which the Department denied the refund in its entirety. In the NOD, the Department noted that it had requested additional documentation from Petitioner that it did not receive. With respect for the claim under the new or expanding business exemption, the NOD stated in part:



By asserting its purchases qualify for tax exemption under s. 212.08(5)(b), F.S., Taxpayer implies its purchases are used to manufacture of process tangible personal property for sale. However, Taxpayer provides no arguments as to how its retail gasoline stations are engaged in manufacturing, processing, compounding, or producing for sale tangible personal property at fixed locations. Additionally, Taxpayer has failed to submit documentation specifically requested, such as properly executed Assignment of Rights to Refund of Sales Tax, an *Application for Temporary tax Exemption Permit*, form DR-1214; proof of tax paid to vendors; production records supporting Taxpayers contention that the machinery and equipment purchased is used in a manufacturing process to produce a new product; a description of the manufacturing process, including the specific machinery and equipment used; and documentation received from the Florida Department of Environmental Protection for the projects.

Nonetheless, in considering Taxpayer's assertions of tax exemption, it is reiterated, pursuant to Rule 12A-1.096(1)(d), F.A.C., promulgated to administer s. 212.08(5)(b), F.S., the phrase "manufacture, process, compound, or produce for sale" means the various industrial operations of a business where raw materials will be put through a series of steps to make an item of tangible personal property that will be sold. The gasoline was previously manufactured by a refinery from crude oil. Furthermore, it is the Taxpayer's customers that operate the gasoline dispensing pumps at the retail stations, and not for the purpose of conducting industrial operations. As such, the Department does not find that Taxpayer is engaged in manufacturing operations at its retail gasoline stations with the dispensing pumps and underground tanks. Instead, it is the Department's position, as indicated above, the dispensing pumps and underground storage tanks are more properly classified as storage and delivery systems utilized

subsequent to the conclusion of the manufacturing process by a refinery. Therefore, these items would not qualify for the exemption from tax provided under s. 212.08(5)(b), F.S., and Rule 12S-1.096, F.A.C. (emphasis in original)

15. On March 21, 2018, Southeast Petro filed a Petition for Reconsideration contesting the Notice of Decision of Refund Denial. With the Petition for Reconsideration, Petitioner provided, along with some other documentation, a schedule of the transactions at issue; the assignment of rights to refund from each of the selling dealers to which sales tax were paid; the corresponding invoices; the application for temporary exemption permit (DR-1214); and an explanation of how the refund amount was computed.

16. On August 22, 2018, the Department issued its Notice of Reconsideration of Refund Denial, fully sustaining its denial of Southeast Petro's refund claim. In its Notice of Reconsideration of Refund Denial, the Department reiterated its position stated in the NOD, and added the following statement:

For both of the exemptions sought by Taxpayer, the Department acknowledges Taxpayer has submitted an *Application for Temporary Tax Exemption Permit*, form DR-1213, a reconciliation spreadsheet of the refund claimed, proper [sic] executed Assignment of Rights to Refund of Sales Tax, and various invoices for review and consideration. However, this information is not germane to the refund claim, because the dispensing pumps and underground storage tanks are not qualifying industrial machinery and equipment under the provisions of s. 212.051, F.S. and s. 212.08(5)(b), F.S.

17. On October 19, 2018, Southeast Petro filed its Petition for Chapter 120 Hearing, contesting the Notice of Reconsideration. The case was referred to the Division of Administrative Hearings on November 6, 2019.

18. Southeast Petro paid sales taxes on the purchases of underground storage tanks and dispensing pumps to the vendors supplying the equipment. Those vendors then provided to Southeast Petro Assignment of Rights to Refund of Sales Tax forms, identifying the amount of tax for which they assigned the rights to Southeast Petro.

19. Central Industries, Inc., sold dispensing pumps to Southeast Petro, and on August 23, 2017, assigned the rights to Southeast Petro for refund of the taxes it collected. The amount assigned for transactions occurring from May 1, 2015, through April 30, 2017, is \$52,592.92.

20. Guardian Fueling Technologies, LLC, sold dispensing pumps to Southeast Petro, and on August 23, 2017, assigned the rights to Southeast Petro for refund of taxes it collected. The amount assigned for transactions occurring from May 1, 2015, to April 30, 2017, is \$41,593.82. Guardian Fueling Technologies, LLC, also executed an assignment of rights for a purchase made in March 2015, where the tax paid was \$36,269.31.

21. Sunoco, LLC, sold dispensing pumps to Southeast Petro, and on September 14, 2017, assigned the rights to Southeast Petro for refund of taxes it collected. The amount assigned for transactions occurring from May 1, 2015, to April 30, 2017, is \$8,953.41.

22. Modern Welding Company of Florida, Inc., sold underground storage tanks to Southeast Petro, and on June 29, 2015, assigned the rights to Southeast Petro for refund of the taxes it collected. The amount assigned for transactions occurring from June 2012 to March 2015 was \$16,646.00. It is noted that this assignment covers purchases that extend back past the refund period.

23. When Southeast Petro originally filed its application for a refund, the requested amount was over \$146,000. Over the course of the litigation, Southeast Petro withdrew its claim for refund with respect to some of its sites. The relevant information presented to substantiate the refund claim for each location for which a refund is still sought is listed below. With each

transaction, the information presented is taken from the records provided, as opposed to the composite spread sheets. Fractions of a gallon have been discarded in the calculations, as they do not affect the percentages reached.

#### Site 21

24. Site 21 is an affiliate site located at 5230 University Boulevard, Jacksonville, Florida. Guardian Fueling Technologies sold Southeast Petro four Gilbarco dispensing pumps. The invoice dated October 14, 2016, indicates that it was billed to “M&R Enterprises of Brevard/Southeast Petro.” The total amount invoiced was \$58,747.76, and the tax paid for the purchase was \$3,585.56. The invoice was paid by M&R United, Inc. The invoice includes references to ancillary features, such as a color screen and an HCR card reader for EMV, but the prices for those items are not listed separately.

25. The dispensing pumps were installed by Petroleum Technicians, Inc., on or about December 22, 2016. In the 12 months prior to the installation of the new dispensing pumps, Site 21 sold approximately 675,257 gallons of fuel. In the 12-month period following the installation, from January 1, 2018, through December 31, 2018, Site 21 sold approximately 754,287 gallons of fuel, for an increase in sales of 11.7%. With respect to mid-grade blended fuel, in the 12 months prior to the installation, Site 21 sold 47,891 gallons, as opposed to 63,224 gallons for the identified 12-month period after installation, for an increase in sales of 32%.

#### Site 99

26. Site 99 is an affiliate site located at 1600 Aurora Road, in Melbourne, Florida. Southeast Petro bought new Gilbarco dispensing pumps and related hardware for Site 99 as part of a bulk purchase from Guardian Fueling Technologies. The four dispensing pumps bought as part of the bulk purchase for Site 99, cost \$56,574, with corresponding tax of \$3,960.18. The invoice,

dated March 24, 2015, is billed to M&R Enterprise of Brevard/Southeast Petro.

27. The dispensing pumps were installed by Petroleum Technicians, Inc., on or about May 24, 2015. In the 12 months prior to installation, Site 99 sold approximately 656,820 gallons of fuel. In a 12-month period following the installation, from August 2015 through July 2016, Site 99 sold approximately 693,009 gallons of fuel, for an increase of 5.51%.

28. With respect to mid-grade blended fuel, from September 2014, through May 2015, Site 99 sold 16,733 gallons. The records submitted in Petitioner's Exhibit 33 identifies gasoline sold for the period comprising May through August 2014 on a single page. There is no legend for the types of gasoline sold on this page, and the gas code found in other records corresponding to mid-grade blended gasoline does not appear, so a total for mid-grade fuel sold during the 12-month period cannot be clearly identified. The records are not sufficient to show 12 contiguous months of production or sale of mid-grade fuel.

#### Site 101

29. Site 101 is an affiliate site located at 6842 Wilson Boulevard, Jacksonville, Florida. Southeast Petro bought four new Gilbarco dispensing pumps from Central Industries. The invoice, dated January 4, 2017, is billed to Southeast Petro. The total amount invoiced is \$55,813.49, and the tax paid is \$3,157.84. The invoice includes charges for ancillary items not involved in the blending process, such as speakers, hybrid card readers, and image/graphics.

30. The dispensing pumps were installed by Petroleum Technicians, Inc., on February 9, 2017. In the 12 months prior to the installation of the new dispensing pumps, Site 101 sold approximately 659,658 gallons of fuel. In the selected 12-month period following the installation, from January through December 2018, Site 101 sold approximately 836,764 gallons of fuel, for an

increase of 26.85%. With respect to mid-grade blended fuel, in the 12 months prior to the installation of the new dispensing pumps, Site 101 sold 72,575 gallons, as opposed to 86,312 gallons for the period selected, for an increase of 18.93%.

#### Site 122

31. Site 122 is an affiliate site located at 700 Columbia Boulevard in Titusville, Florida. Central Industries, Inc., sold Southeast Petro five new Gilbarco dispensing pumps and related hardware. The invoice, dated January 5, 2017, is billed to Southeast Petro. The total amount invoiced is \$70,806, and the sales tax paid is \$4,006.49. Included in the invoice are charges for ancillary items not involved in the blending process, such as speakers, hybrid card readers, and image/graphics.

32. The new dispensing pumps were installed by Petroleum Technicians, Inc., on January 19, 2017. In the 12 months prior to the installation of the new dispensing pumps, Site 122 sold approximately 1,208,313 gallons of fuel. In the selected 12-month period following the installation, from February 2017 through January 2018, Site 122 sold approximately 1,310,010 gallons of fuel, for an increase of 8.42%. With respect to mid-grade blended fuel, in the 12 months prior to installation of the new dispensing pumps, Site 122 sold 67,918 gallons, as opposed to 58,940 gallons for the identified 12-month period after installation. As sales of this grade of fuel actually went down, mid-grade fuel did not see an increase of 5%.

#### Site 234

33. Site 234 is an affiliate site located at 3860 Highway A1A in Melbourne, Florida. Central Industries, Inc., sold Southeast Petro six new Gilbarco dispensing pumps and related hardware. The invoice, dated January 4, 2017, is billed to Southeast Petro. The total amount invoiced is \$84,404.90 and the sales tax paid is \$4,776.22. Included in the invoice are

charges for ancillary items not involved in the blending process, such as speakers, hybrid card readers, and the Mobil image.

34. Petroleum Technicians, Inc., installed the new dispensing pumps on January 13, 2017. In the 12 months prior to the installation of the new dispensing pumps, Site 234 sold 582,758 gallons of fuel. In the selected 12-month period following the installation, from January through December 2018, Site 234 sold 639,150 gallons of fuel, for an increase of 9.68%. With respect to mid-grade blended fuel, in the 12 months prior to the installation of the new dispensing pumps, Site 234 sold 37,702 gallons, as opposed to 43,842 gallons for the post-installation period selected, for an increase in sales of 16.29%.

#### Site 320

35. Site 320 is an affiliate site located at 4353 West Main Street in Mims, Florida. Central Industries sold Southeast Petro four new dispensing pumps and related hardware for this site. The invoice, dated January 5, 2017, is billed to Southeast Petro. The total amount invoiced is \$54,329.49, and the sales tax paid is \$3,073.84. Additional hardware was invoiced for this site on January 20, 2017, for \$1,484.00, and sales tax paid of \$84.00. The total for the combined invoices is \$55,813.49, with total sales tax of \$3,157.84. Included in the invoice are charges for ancillary items not involved in the blending process, such as speakers, hybrid card readers, and the BP image.

36. Petroleum Technicians, Inc., installed the new dispensing pumps on January 18, 2017. In the 12 months prior to the installation of the new dispensing pumps, Site 320 sold 1,135,378 gallons of fuel. In the selected 12-month period following the installation, from January through December 2018, Site 320 sold approximately 1,200,945 gallons of fuel, for an increase of 5.77%. With respect to mid-grade blended fuel, in the 12 months prior to the installation of the new dispensing pumps, Site 320 sold 33,106 gallons, as

opposed to 36,235 gallons for the period selected, for an increase in sales of 9.45%.

#### Site 343

37. Site 343 is an affiliate site located at 4090 West Midway Road in Fort Pierce, Florida. Central Industries, Inc., sold Southeast Petro six Gilbarco dispensing pumps and related hardware. The invoice, dated January 5, 2017, is billed to Southeast Petro. The total amount invoiced for the six dispensing pumps is \$84,404.90, and the sales tax paid is \$4,776.22. Included in the invoice are charges for ancillary items not involved in the blending process, such as speakers, hybrid card readers, and image/graphics. There is a second invoice for Site 343 from Central Industries, Inc., for the purchase of a Gilbarco diesel dispensing pump. However, this pump does not have the blending capability of the other pumps purchased, and Petitioner acknowledges it would not support the criteria for a new and expanding business exemption, so it is not included.

38. Petroleum Technicians, Inc., installed the six dispensing pumps on February 23, 2017. In the 12 months prior to the installation of the new dispensing pumps, Site 343 sold 1,107,473 gallons of fuel. In the selected 12-month period following the installation, from January through December 2018, Site 343 sold 1,289,854 gallons of fuel, for an increase of 16.47%. With respect to the mid-grade blended fuel, in the 12 months prior to installation of the new dispensing pumps, Site 343 sold 47,811 gallons, as opposed to 57,614 gallons for the post-installation period selected, for an increase of 20.5%.

#### Site 346

39. Site 346 is an affiliate site located at 1595 Island Lane in Orange Park, Florida. Guardian Fueling Technologies sold Southeast Petro eight Gilbarco dispensing pumps and related hardware for Site 346. The invoice,



dated November 25, 2016, is billed to M&R Enterprises of Brevard/Southeast Petro. The total amount invoiced for the eight dispensing pumps is \$118,047.12, and the sales tax paid is \$7,722.72. The invoice includes references to ancillary features, such as a color screen and an HCR card reader for EMV, but the prices for those items are not listed separately.

40. Petroleum Technicians, Inc., installed the eight new dispensing pumps for Site 346 on December 29, 2016. In the 12 months prior to the installation of the new dispensing pumps, Site 346 sold 1,004,375 gallons of fuel. In the selected 12-month period following the installation, from January through December 2018, Site 346 sold approximately 1,084,628 gallons of fuel, for an increase of 7.99%. With respect to the mid-grade blended fuel, in the 12 months prior to installation of the new dispensing pumps, Site 346 sold 70,508 gallons, as opposed to 84,059 gallons for the selected post-installation period selected, for an increase of 19.22%.

#### Site 349

41. Site 349 is an affiliate site located at 11555 Bonita Beach Road Southeast, in Bonita Springs, Florida. Guardian Fueling Technologies sold Southeast Petro four Gilbarco dispensing pumps and related hardware for Site 349. The invoice, dated October 14, 2016, is billed to M&R Enterprise of Brevard/Southeast Petro. The total amount invoiced for the four dispensing pumps is \$56,928.61, and the sales tax paid is \$3,474.53. The invoice includes references to ancillary features, such as a color screen and an HCR card reader for EMV, but the prices for those items are not listed separately.

42. Guardian Fueling Technologies also installed these pumps on November 18, 2016. In the 12 months prior to the installation of the new dispensing pumps, Site 349 sold 702,975 gallons of fuel. In the selected 12-month period following the installation, from January through December 2018, Site 349 sold approximately 815,819 gallons of fuel, for an increase of 16.05%. With respect to mid-grade blended fuel, in the 12 months prior to

installation of the new dispensing pumps, Site 349 sold 66,228 gallons, as compared to 85,116 gallons for the selected post-installation period, for an increase in sales of 28.52%.

#### Site 355

43. Site 355 is an affiliate site located at 2653 Boggy Creek Road in Kissimmee, Florida. Southeast Petro bought six Gilbarco dispensing pumps and related hardware from Guardian Fueling Technologies as part of a bulk purchase. The invoice, dated March 24, 2015, is billed to M&R Enterprises of Brevard/Southeast Petro. For the pumps and equipment purchased for Site 355, the cost for the pumps (pretax) was \$83,738.00, and the sales tax was \$5,861.66.

44. Petroleum Technicians, Inc., removed the old pumps and installed the new dispensing pumps on April 27, 2015. For the period from September 1, 2014, through March 31, 2015, Site 355 sold 646,383 gallons of fuel. Only seven months of data is included because Southeast Petro and its affiliated companies did not own the site for a full year before the new pumps were installed, and the gas station was closed before ownership was transferred. No evidence was submitted regarding how long the station was closed prior to purchase. The evidence presented does not provide 12 contiguous months of production or sales records prior to installation of the new equipment.

#### Site 385

45. Site 385 is an affiliate site located at 420 United States Highway 1, in Vero Beach, Florida. Central Industries, Inc., sold Southeast Petro five new Gilbarco dispensing pumps and related hardware. The invoice, dated October 28, 2016, is billed to Southeast Petro. The total cost of the invoice, including tax, is \$69,305.34, and the sales tax paid is \$4,457.57. Included in the invoice are charges for ancillary items not involved in the blending process, such as speakers, hybrid card readers, and Exxon graphics. There is

an additional invoice for this site dated October 27, 2016, for hanging hardware. The total of this invoice is \$2,176.69, with sales tax paid of \$127.00.

46. Petroleum Technicians, Inc., installed the dispensing pumps on March 7, 2017. For the 12-month period prior to installation, Site 385 sold 599,935 gallons of fuel. For the selected 12-month period following the installation, January through December 2018, Site 385 sold 630,265 gallons, for an increase of 5.06%. With respect to the mid-grade blended fuel, for the 12 months prior to installation, Site 385 sold 39,588 gallons, as opposed to 45,098 gallons for the post-installation period selected, for an increase of 13.92%.

#### Site 403

47. Site 403 is an affiliate site located at 5385 Timuquana Road in Jacksonville, Florida. Central Industries, Inc., sold Southeast Petro four Gilbarco dispensing pumps and related hardware for this location. The invoice, dated January 4, 2017, bills Southeast Petro for the purchase. The total billed is \$55,813.49, with sales tax paid of \$3,157. Included in the invoice are charges for ancillary items not involved in the blending process, such as speakers, hybrid card readers, and image/graphics.

48. Petroleum Technicians, Inc., installed the dispensing pumps on March 28, 2017. Southeast Petro's affiliate owned Site 403 for only nine months prior to the installation of the dispensing pumps by Petroleum Technicians, so Southeast only submitted sales data for the nine months prior to the installation that an affiliate owned the location. Unlike Site 355, it is not clear whether the site was closed prior to the installation of the new pumps or simply changed ownership. For the nine months provided, Site 403 sold a total of 139,319 gallons of fuel. Using an average of gallons sold for that period, it is estimated that a year's worth of sales would be approximately 185,759 gallons. For the selected post-installation period,

January through December 2018, Site 403 sold 395,300 gallons of fuel. However, Petitioner did not provide 12 contiguous months of production or sales records prior to the installation of the new dispensing pumps.

49. With respect to the mid-grade blended fuel, for the nine months the affiliated entity owned Site 403 prior to installation, it sold 11,362 gallons. Twelve contiguous months of records related to mid-grade fuel were not provided.

### JQ Trading

50. JQ Trading is not an affiliate entity. It is an independent dealer location owned by Mills Chevron, LLC, located at 900 Mills Avenue in Orlando, Florida, to whom Southeast Petro sells fuel and has a dealer supply agreement. Pursuant to that dealer supply agreement, Southeast Petro supplies the pumps and related equipment in addition to delivering fuel to the site.

51. Central Industries, Inc., sold Southeast Petro two new Gilbarco dispensing pumps and related hardware for JQ Trading. The invoice, dated January 5, 2017, is billed to Southeast Petro. The total cost of the invoice is \$28,616.41, and the sales tax paid is \$1,618.38. Included in the invoice are charges for ancillary items not involved in the blending process, such as speakers, hybrid card readers, and image/graphics.

52. Petroleum Technicians, Inc., installed the dispensing pumps on January 30, 2017. Southeast Petro's records show no gasoline sales for January 2017. For the 12 months preceding January 2017, JQ Trading sold 270,977 gallons of fuel. For the selected 12-month period following the installation, March 2017 through February 2018, JQ Trading sold 291,177 gallons, for an increase of 7.45%. Petitioner did not submit adequate documentation to determine the amount of mid-grade gasoline sold or the percentage of change.

Aahan/Citrus

53. Aahan/Citrus is an independent dealer location owned by Aahan, Inc., and located at 9548 North Citrus Springs Boulevard in Citrus Springs, Florida. Sunoco, LLC, sold Southeast Petro one dispensing pump for this location. The invoice, dated July 15, 2016, is billed to Southeast Petro. The total billed is \$12,041.60, and the sales tax paid is \$681.60.

54. Southeast Petro acknowledges that it did not submit the invoice for the installation of the dispensing pump, but Mr. Clark, the owner of Petroleum Technicians, testified credibly that he installed the pump. The invoice indicates that the ship date for the dispensing pump was July 15, 2016. Mr. Clark also testified that installation can take place immediately after dispensing pumps are shipped, or as much as six months later, so relying on the ship date as the installation date is unrealistic. In the end, it does not matter, because regardless of when the dispensing pumps were installed, the increase in sales compared to the selected 12-month post-installation period is more than five percent. More specifically, the selected post-installation period is January through December 2018, and during that period, Aahan/Citrus sold 334,546 gallons of fuel. Assuming that the installation occurred within six months of the invoice, consistent with Mr. Clark's testimony, the pre-installation comparators and the percentage increases are as follows:

August 2015 - July 2016: 203,669 gallons, for a 64.26% increase;  
September 2015 - August 2016: 203,675 gallons, for 64.24% increase;  
October 2015 - September 2016: 203,960 gallons, for a 64.03% increase;  
November 2015 - October 2016: 195,340 gallons, for a 71.26% increase;  
December 2015 - November 2016: 202,772 gallons, for 64.99% increase; or  
January 2016 -December 2016: 202,779 gallons, for a 64.98% increase.

55. No records were submitted from which the sales of mid-grade blended fuel can be identified or the percentage of increase, if any, can be determined.

Snappy Food Mart

56. Snappy Food Mart is an independent dealer location located at 1716 Oceanshore Boulevard in Ormond Beach, Florida. Sunoco, Inc., sold Southeast Petro three Gilbarco dispensing pumps for this location. The invoice, dated November 30, 2015, with a ship date listed as the same day, is billed to Southeast Petro. The total cost of the invoice is \$35,189.73, with sales tax paid of \$2,147.73.

57. Like Aahan/Citrus, the installation invoice could not be located, although Mr. Clark testified that his company installed the pumps. As noted above, since pumps are sometimes installed up to six months after purchase, using the ship date (or the day after) as the installation date is unrealistic. The total gallons of fuel sold for the selected post-installation period of January through December 2018 is 251,355 gallons. Using the scenarios outlined below, the percentage increase for each is still over five percent.

December 2014 – November 2015: 205,142 gallons,, for a 22.53% increase;  
January 2015 – December 2015: 200,807 gallons, for a 25.17% increase;  
February 2015 - January 2016: 201,664 gallons, for a 24.64% increase;  
March 2015 – February 2016: 198,116 gallons, for a 26.87% increase;  
April 2015 – March 2016: 214,614 gallons, for a 17.12% increase; or  
May 2015 – April 2016: 212,416 gallons, for an 18.33% increase.

58. No records were submitted from which the sales of mid-grade blended fuel can be identified or the percentage of increase, if any, can be determined.

Zack's

59. Zack's is an independent dealer location owned by Zack's Oil Enterprises, LLC, and located at 4201 Southwest 64th Avenue, in Davie, Florida. Southeast Petro purchased four dispensing pumps and related hardware for Zack's from Sunoco, LLC, at a total cost of \$45,444.32, with tax paid of \$2,572.32. The invoice, dated October 6, 2014, is billed to Southeast Petro.

60. Unlike other vendors for dispensing pumps, Sunoco issues its invoices after it ships the pumps, so, according to Summit Shah, pumps purchased from Sunoco are sometimes installed prior to the date on the invoice. In this case, the invoice from Petroleum Technicians, Inc., indicates that the dispensing pumps were installed August 24, 2015.

61. Petitioner submitted gasoline sales records from September 2014 forward. The Dealer Supply Agreement for this location was assigned to Southeast Petro in July 2015, shortly before the installation of the new dispensing pumps. For the period beginning September 1, 2014, through August 30, 2015 (with no sales in August 2015), Zack's sold 697,198 gallons of fuel. For the selected 12-month post-installation period, January through December 2017, Zack's sold 743,104 gallons of fuel, for an increase of 6.58%.

62. No records were submitted from which the sales of mid-grade blended fuel can be identified or the percentage of increase, if any, can be determined.

#### BAM

63. BAM is also an independent dealer location to whom Southeast Petro supplies fuel, and is located at 500 Highway A1A, in Satellite Beach, Florida. Southeast Petro purchased three dispensing pumps and related hardware for BAM from Sunoco, Inc. The invoice, dated July 1, 2013, is billed to Southeast Petro and lists a total of \$35,024.52, with sales tax paid of \$1,982.52. However, the assignment of rights from Sunoco, LLC, only covers sales tax paid from May 1, 2015, to April 30, 2017. Without an assignment of rights for the time period when these dispensing pumps were purchased, they cannot form the basis for a refund of the taxes paid.

64. All of the records regarding fuel sold at each location described above were submitted for the purpose of establishing "production." However, the records do not reflect production of any product, but rather, the volume of sales experienced at each location prior to and after the installation of the new dispensing pumps. While it is clear that overall sales at each location

increased more than 5%, sometimes markedly so, the records submitted do not establish changes in production. Moreover, inasmuch as Petitioner is not contending that it “manufactures, processes, compounds or produces” premium or regular unleaded gas, sales records related to these products that Southeast Petro distributes, as opposed to manufacturing, processing, compounding, or producing, cannot establish production increases. Based upon all of the evidence presented, the more persuasive and compelling evidence is that the dispensing pumps provide a valuable improvement in the delivery of fuel to the customer, but are not a part of the production of the fuel itself.

65. Petro also purchased two storage tanks from Modern Welding, for which they paid a total of \$95,529.50 and sales tax of \$5,454.50. However, unlike the dispensing pumps, storage tanks do not contribute to the “making” of a different octane-rated fuel. The evidence presented indicates that the storage tanks’ primary purpose is to store the gasoline held at each fuel location until the fuel is purchased by a customer. The tanks, like the dispensing pumps, are part of the delivery system for fuel as opposed to its production.

66. Both tanks were installed at locations that were new businesses at the time of installation. Therefore, no prior production records for these locations were submitted.

#### CONCLUSIONS OF LAW

67. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties pursuant to sections 120.569, 120.57(1), and 120.80(14).

68. The Department is the agency responsible for administering the revenue laws of the State of Florida, including the imposition and collection of the state’s sales and use taxes, pursuant to section 213.05.



69. As the taxpayer seeking a refund, Southeast Petro has the burden of proving that the tax sought through this refund application is not owed. *Dep't of Transp. v. J.W. C. Co.*, 396 So. 2d 778 (Fla. 1st DCA 1981). The burden of proof is measured by a preponderance of the evidence standard. § 120.57(1)(j), Fla. Stat. In order to show that the tax at issue here is not owed, Petitioner must demonstrate that it is a new business or expanding business as defined by section 212.08(5) and Florida Administrative Code Rule 12A-1.096, and that the equipment purchased meets the definition of machinery or equipment used for the purpose of manufacturing, processing, compounding, or producing items of tangible personal property for sale.

70. A widely recognized rule of statutory construction is that exemptions to taxing statutes are strictly construed against the taxpayer. *Asphalt Pavers, Inc. v. Dep't of Rev.*, 584 So. 2d 55, 57 (Fla. 1st DCA 1991)(an exemption is a tax statute that is strictly construed against the person claiming the exemption); *Green v. Pederson*, 99 So. 2d 292, 296 (Fla. 1957) (“he who would shelter himself under an exemption clause in a tax statute must show clearly that he is entitled under the law to exemption, and the law is to be strictly construed as against the person claiming the exemption and in favor of the taxing power”); *United States Gypsum Co. v. Green*, 110 So. 2d 409, 413 (Fla. 1959).

71. This case turns on the interpretation of section 212.08(5)(b), which creates an exemption for new and expanding businesses, and rule 12A-1.096, which implements the exemption created by section 212.08(5)(b). Section 212.08(5)(b) provides:

(5)(b) Machinery and equipment used to increase productive output.---

1. Industrial machinery and equipment purchased for the exclusive use by a new business in spaceport activities as defined in s. 212.02 or for use in new businesses that manufacture, process, compound, or produce for sale items of tangible personal

property at fixed locations are exempt from the tax imposed by this chapter upon an affirmative showing by the taxpayer to the satisfaction of the department that such items are used for a new business in this state. Such purchases must be made before the business first begins its productive operations, and delivery of the purchased item must be made within 12 months after that date.

2. Industrial machinery and equipment purchased for exclusive use by an expanding facility which is engaged in spaceport activities as defined by s. 212.02 or for use in expanding manufacturing facilities or plant units which manufacture, process, compound, or produce for sale items of tangible personal property at fixed locations in this state are exempt from any amount of tax imposed by this chapter upon an affirmative showing by the taxpayer to the satisfaction of the department that such items are used to increase the productive output of such expanded facility or business by not less than 5 percent.

\* \* \*

d. If a qualifying business entity fails to apply for a temporary exemption permit or if the tentative determination of the department required to obtain a temporary exemption permit is negative, a qualifying business entity shall receive the exemption provided in subparagraph 1. or subparagraph 2. through a refund of previously paid taxes. No refund may be made for such taxes unless the criteria mandated by subparagraph 1. or subparagraph 2. have been met and commencement of production has occurred.

\* \* \*

6. For the purposes of the exemptions provided in subparagraphs 1. and 2., these terms have the following meanings:

a. "Industrial machinery and equipment" means tangible personal property or other property that

has a depreciable life of 3 years or more and that is used as an integral part in the manufacturing, processing, compounding, or production of tangible personal property for sale or is exclusively used in spaceport activities. . . .

b. “Productive output” means the number of units actually produced by a single plant, operation, or product line in a single continuous 12-month period, irrespective of sales. Increases in productive output shall be measured by the output for 12 continuous months selected by the expanding business after completion of the installation of such machinery or equipment over the output for the 12 contiguous months immediately preceding such installation. However, in no case may such time period begin later than 2 years after completion of the installation of the new machinery and equipment. The units used to measure productive input shall be physically comparable between the two periods, irrespective of sales.

72. In its Notice of Reconsideration of Refund Denial, the Department did not indicate that its decision was made based upon a lack of documentation by Petitioner. The Department acknowledged that it had received additional information from Petitioner, but found it not to be germane because the dispensing pumps and underground storage tanks are not qualifying industrial machinery and equipment under the provisions of sections 212.051 and 212.08(5)(b).

73. As a preliminary matter, the Department contends in its Proposed Recommended Order that the entities that operate the various gas stations/convenience stores are the proper parties to seek refunds in this case. However, the definition of “fixed location” in rule 12A-1.096(1)(a) does not support the Department’s argument, and the separate entities neither own the dispensing pumps nor paid the tax on their purchase. Further, the Department did not deny the application for refund because Petitioner was the wrong entity. It denied the refund because the Department rejects the

contention that the dispensing pumps and underground tanks are equipment or machinery that manufacture, process, compound, or produce for sale items of tangible personal property at fixed locations in this state.

74. The Department also relies upon the language in rule 12A-1.096(5)(c)1., which states in part, “only the qualified business entity that will use the qualifying machinery and equipment at a fixed location in this state in manufacturing, processing, compounding or producing tangible personal property for sale ... is entitled to request a refund.” The more persuasive evidence presented is that Petitioner is responsible for supplying the gas pumps and tanks but is not the entity at each location that is “using” the equipment at each location to increase the output of fuel. Southeast Petro does not manage the gas stations, i.e., actually sell the fuel or operate the convenience stores. Rather it supplies, provides, and maintains the equipment so that it will deliver the gasoline for each affiliate site and dealer location.

75. Rule 12A-1.096 provides extensive guidance in determining whether a taxpayer is entitled to a refund. After careful consideration of all of the factors discussed in the rule, and comparison of those factors to the information provided, it is concluded that the purchases here are not appropriate for a refund as purchases of a new or expanding business.

76. Rule 12A-1.096(2)(e) states that the Executive Director will determine whether a business qualifies for an exemption as a new business based on the facts of each particular case. The rule then gives three examples: 1) a newly formed company that opens a facility or plant at a fixed location in this state; 2) an addition to, or enlargement of, an existing facility or plant, or the installation of additional machinery or equipment to produce a product that represents a distinct and separate *activity* from that already produced at that location; and 3) opening a new facility or plant at a fixed location. The rule also identifies situations that do not constitute a new business, including the following:

(2)(e)2. ... A new business does not mean an addition to, or the enlargement of, an existing facility or plant, or the installation of additional machinery or equipment at an existing facility or plant, for the purpose of manufacturing, processing, compounding or producing component parts that were previously purchased from, or fabricated by, outside sources for inclusion in that business' finished items of tangible personal property for sale.

\* \* \*

4. A new business does not mean the change of ownership of an existing facility or plant, at a fixed location, in this state, that manufactures, processes, compounds, or produces items of tangible personal property for sale, ... by a purchase arrangement, merger, or some other similar means, unless such facility or plant ceased doing productive operations for a period of not less than 12 months.

77. Here, there was no evidence presented that Southeast Petro, as opposed to some of the affiliated entities, is a newly-formed company. To the contrary, Mr. Shah testified that he has worked with Southeast Petro for 22 years. Similarly, the new dispensing pumps at issue here were not the installation of *additional* equipment or machinery. The evidence presented demonstrated that the dispensing pumps and machinery were the installation of replacement equipment.

78. There was some testimony that some of the gas stations were new acquisitions, which was the reason a full year of prior sales could not be produced. There was evidence that at least one location was closed prior to its purchase by an affiliated entity. Petitioner did not know whether those facilities were closed for a full year prior to being purchased and the dispensing pumps being installed.

79. Based on the totality of the evidence presented, Southeast Petro did not establish that it was entitled to a refund as a new business.

80. Rule 12A-1.096(3) also identifies what constitutes an expanding business, stating:

(a) The purchase of industrial machinery and equipment, parts and accessories, and the installation thereof, is exempt from tax when purchased by an expanding business that uses such machinery and equipment at a fixed location in this state to increase the productive output of tangible personal property that is manufactured, processed, compounded, or produced for sale by not less than 5 percent, or for exclusive use in spaceport activities.

(b) The Executive Director or the Executive Director's designee will determine whether a business qualifies for exemption as an expanding business, based upon the facts of each case using the following guidelines:

1.a. An expanding business means an addition to, or the modernization or enlargement of, an existing facility, or the installation of additional machinery and equipment to manufacture, process, compound or produce an item of tangible personal property that is already produced at that fixed location in this state or is similar to an item of tangible personal property that is already being produced at that fixed location.

b. An expanding business means an addition to, or the modernization or enlargement of, an existing facility or the installation of additional machinery and equipment to begin manufacturing, processing, compounding, or producing a component item of tangible personal property that will be incorporated into a finished item of tangible personal property that is already being produced at that fixed location. ...

\* \* \*

2. An expanding business means closing an existing plant or an operation in a plant in this state and moving it to a new location in this state within 12 months of the closing.

3. An expanding business means the purchase of an existing facility to manufacture, process, compound, or produce an item of tangible personal property that is already being produced at that facility or is similar to an item of tangible personal property that is already produced at that facility.

81. Petitioner did not establish that the dispensing pumps and underground tanks were an addition to, the modernization of, or an enlargement of existing facilities or the installation of additional machinery or equipment to manufacture, process, compound, or produce an item of personal property that is already produced at that fixed location or is similar to tangible personal property that is already produced at that fixed location. Rather, the most persuasive evidence shows that the dispensing pumps and underground tanks replaced existing equipment that served the same purpose. Moreover, Petitioner did not establish mid-grade gasoline was produced at the locations without the use of the dispensing pumps.

82. Petitioner did not establish that the dispensing pumps and underground tanks are an addition to, or the modernization of, an existing facility or the installation of machinery or equipment to begin manufacturing, processing, compounding, or producing a component item of tangible personal property that will be incorporated into a finished item of tangible personal property for sale that is already being produced at that fixed location. Instead, the persuasive evidence indicates that premium and unleaded gasoline is incorporated to make blended mid-grade gasoline, but the unleaded and premium gas are not manufactured at each site. Rather, they are delivered to each site by Southeast Petro.

83. Likewise, Petitioner did not establish that it purchased an existing facility to manufacture, process, compound, or produce an item of tangible

personal property that is already being produced at that facility or is similar to one already produced there.

84. In sum, Petitioner did not establish that it meets the definition of an expanding business.

85. Had Petitioner established that it met the definition of a new or expanding business, its problems do not end there. Section 212.08(5)(b)1. requires that the industrial machinery and equipment be used in expanding manufacturing facilities or plant units which manufacture, process, compound, or produce for sale items of tangible personal property at fixed locations. Petitioner is correct that the four terms--manufacture, process, compound, or produce--are used in the disjunctive. “The use of a disjunctive in a statute indicates alternatives and requires that those alternatives be treated separately.” *Ellenwood v. Bd. of Architecture and Interior Design*, 835 So. 2d 1269, 1270 (Fla. 2003); *Osceola Cty. Sch. Bd. v. Arace*, 884 So. 2d 1003, 1005 (Fla. 1st DCA 2004); *Dep’t of Bus. & Prof’l Reg. v. Salvation Lmted., Inc.*, 452 So. 2d 65, 67 (Fla. 1st DCA 1984). Petitioner is also correct that absent a statutory definition, the definition contained in rule 12A-1.096(1)(d) injects a requirement for use of raw materials where the statute does not. The Department cannot inject new requirements the statute does not include. *Salvation Lmted.*; § 120.52(8)(b), Fla. Stat. However, as Petitioner suggests, the terms “manufacture,” “process,” “compound,” and “produce” should be given their plain and ordinary meaning. *Verizon Fla., Inc. v. Jacobs*, 810 So. 2d 906, 908 (Fla. 2002); *Burgess v. State*, 198 So. 3d 1151, 1155 (Fla. 2d DCA 2016). As discussed below, the rule incorporates the dictionary definition for the term “manufacture.”

86. Applying the dictionary definitions provided by Petitioner, “manufacturing” is “something made from raw materials by hand or by machinery, or to make a product suitable for use.” *Merriam-Webster Online Dictionary*, [www.merriam-webster.com/manufacture](http://www.merriam-webster.com/manufacture) (last visited October 11, 2020). The dispensing pumps do not use raw materials, and do not *make*



anything suitable for use, as the premium and unleaded gas is already suitable for use. “Processing” is “to treat or make by a special process especially when involving synthesis or artificial modification.” *Id.* at [www.merriam-webster.com/process](http://www.merriam-webster.com/process) (last visited October 11, 2020). The gasoline here is not treated by the blenders, and there is no synthesis or artificial modification. It is most similar to “compounding,” that is, “form[ing] by combining parts, or the union of separate elements, ingredients, or parts.” *Id.* at [www.merriam-webster.com/compound](http://www.merriam-webster.com/compound) (last visited October 11, 2020). However, the blenders are not combining parts, but rather, mixing two finished products that are produced elsewhere, each sellable alone. Finally, if they were to “produce,” under any definition, the application for refund fails because both section 212.08(5)(b)5. and rule 12A-1.096(7) expressly exclude oil and gas exploration or production operations from the exemption for new and expanding businesses.

87. Additionally, rule 12A-1.096(4) provides:

(4) Manufacturing Business Classification Factors.

(a) When an additional product is made at an existing fixed location, the determination whether that business is classified for the exemption as a new business or as an expanding business will depend upon whether the additional product represents an economic activity that is distinct and separate from a product, or a group of products, that is already being manufactured, processed, compounded or produced at that location.

\* \* \*

(d) Additional products that merely differ in size, color, flavor, style, packaging, or model line, or existing products that merely incorporate newer technology, are not considered to be distinct and separate economic activity.

88. The blending of fuel to produce mid-grade fuel is not, based on the evidence presented, the production of an additional product that was not

already sold at each of the sites involved, whether an affiliate or an independent store. In each case, the equipment is providing a different delivery method for a gasoline octane rating sold there previously. Further, the “additional product,” i.e., blended mid-grade fuel, is not an economic activity that is distinct and different from what is already manufactured, processed, compounded, or produced at each location. It cannot be, because no product was manufactured, processed, compounded, or produced at any of the locations. They sold gasoline. The only difference here is that the blended pumps deliver the gasoline to the customer more efficiently.

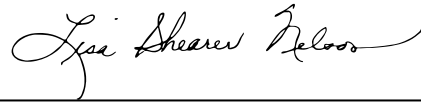
89. Finally, section 212.08(5)(b)6.b. requires that production output be demonstrated by production records, not sales records. Here, Southeast Petro is not producing the unleaded and premium gasoline, it is delivering it for sale, on an as-needed basis. If Petitioner did meet the definition of an expanding business, only those records related to mid-grade fuel would be relevant, because only those records could arguably represent a change in something produced at each location.

90. At bottom, the dispensing pumps improve the delivery method for fuel. While their function is valuable and improves the efficiency of fuel delivery, the installation of replacement dispensing pumps that blend unleaded and premium fuel are not entitled to a refund pursuant to section 212.08(5).

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner’s Application for Refund as a new or expanding business be denied, and its Petition for Chapter 120 Hearing be dismissed.

DONE AND ENTERED this 19th day of October, 2020, in Tallahassee, Leon County, Florida.



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LISA SHEARER NELSON  
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Division of Administrative Hearings  
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Filed with the Clerk of the  
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this 19th day of October, 2020.

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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.