DEPARTMENT OF REVENUE

Executive Director
Lisa Vickers

12/12/2011

Mr. Robert Clarke
Senior Manager
Grant Thornton, LLP
101 East Kennedy Boulevard – Suite 3850
Tampa, Florida 33602-5152

Re: **Notice of Decision of Refund Denial**
Gate Petroleum Company
BPN: 628379
Audit # : 20110286
Sales and Use Tax
Period: 10/01/2007 - 10/31/2010

Refund Claimed:	$160,935.00
Proposed Refund Denial:	$160,935.00
Refund Allowed:	$ 0.00

Dear Mr. Clarke:

This is the Department's response to the protest letter dated 02/04/2011, filed against the referenced refund denial. The letter of protest, the case file, and other available information have been carefully reviewed. This reply constitutes the issuance of our Notice of Decision of Refund Denial, pursuant to the provisions of Rule Chapter 12-6, F.A.C. It represents our position based on applicable law to the issues under protest.

ISSUE

Whether Gate Petroleum Company's ("Gate's") underground storage tank systems are exempt from sales and use tax and eligible for a refund under the provisions of s. 212.051(1), F.S., as systems primarily used for the control or abatement of pollution or contaminants in the manufacturing, processing, compounding, or producing for sale items of tangible personal property.

EXHIBIT
B

FACTS

Gate operates retail gasoline stations in Florida. These locations also sell general merchandise and other petroleum products. These locations sell regular-grade, mid-grade, and premium-grade gasolines. Regular-grade and premium-grade gasolines are stored in underground storage tanks at the locations. The sale of mid-grade gasoline results from the immediate blending of regular-grade and premium-grade gasolines at the dispenser at the time the fuel is pumped into a customer's motor vehicle.

TAXPAYER ARGUMENT

Gate's gasoline service stations are subject to regulation by the Florida Department of Environmental Regulation's ("DEP's") "Storage Tank Regulation Program." These regulations provide for: the general performance standards to prevent groundwater pollution, require spill containment systems, regulate dispensing systems, require secondary containment systems, require cathodic protection systems, and provide for the situs and interstitial monitoring of tanks. The tanks are used primarily for the control of pollution/contaminants in manufacturing. Gasoline is a pollutant/contaminant. Tangible personal property is being manufactured for sale in that premium-grade gasoline is mixed at the dispenser with regular-grade gasoline in order to make mid-grade gasoline. Accordingly, all of the equipment purchased for the service stations from the initial delivery, storage, blending, and throughout the dispensing stage is exempt from sales and use tax and eligible for a refund under the provisions of s. 212.051(1), F.S., as systems primarily used for the control or abatement of pollution or contaminants in the manufacturing, processing, compounding, or producing for sale items of tangible personal property pursuant to DEP's regulations.

LAW & DISCUSSION

The exemption in s. 212.051(1), F.S applies to equipment used **primarily** for the **control or abatement** of pollution or contaminants **in manufacturing, processing, compounding, or producing** for sale items of tangible personal property. The items purchased for the control of pollution or contaminants "must be used, installed, or constructed to meet a law implemented by, or a condition of a permit issued by, the Department of Environmental Protection." Underground storage tank systems are subject to regulation by DEP as provided in Chapter 62-761, F.A.C. Further, gasoline vapor emissions from dispensing operations are regulated by DEP under Chapter 62-252, F.A.C. Gasoline is a pollutant pursuant to Rule 62-761.200(48), F.A.C. Therefore, the three key issues of contention here relate to the terms in bold.

First, the **primary** purpose for the gas tanks and pumps is for the storage and delivery of gasoline at retail gas stations. Pursuant to Rule 62-8.020(1), F.A.C., "used primarily" means "that the use of a facility in the control or abatement of pollution or contaminants outweighs its use for any other purpose." The gas stations would have similar equipment even in the absence of the DEP regulations. The fact that the equipment may be of a higher quality, better construction, a more sophisticated design, or provides more safeguards so that gasoline does not leak, does not change the fact that the equipment is first and foremost commercial equipment.

In our meeting of September 12, 2011, it was offered that Gate would not have purchased the new service station equipment if it was not required to do so by DEP. Businesses are subject to many governmental regulations, such as environmental, safety, or health, with respect to the operation of their business or to the equipment that they are required to have. However, those regulations do not change the nature of the business property. For example, fire regulations may require the installation of fire rated doors and panic hardware in public buildings, but that does not change the fact that the doors are still just parts of a building.

Second, DEP regulates service station equipment for the purposes of pollution prevention, not for the control or abatement of pollution in product manufacturing. There is evidence in the legislative history that the legislature declined to extend this tax exemption to pollution prevention. See House Staff Analysis of HB 3229 (June 17, 1998). Instead, it focused on the **control or abatement** of pollution in industrial or manufacturing processes. There is a clear distinction between preventing pollution from a pollutant sold to consumers at retail and controlling or abating pollution in the manufacturing, processing, compounding, or producing of items of tangible personal property.

Third, and most importantly, a retail gas station is not engaged in "industrial operations," and the gas sold is not being used **in manufacturing, processing, compounding, or producing** for sale items of tangible personal property. Under Rule 12A-1.096(1)(d), F.A.C., "'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 industrial operations must bring about a change in the composition or physical nature of the raw materials. Where materials are merely repackaged or redistributed, those operations are not manufacturing, processing, compounding, or producing for sale."

It is claimed that mid-grade gasoline is "manufactured" when high-grade gasoline is mixed at the dispenser with regular-grade gasoline. It is important to note that a service station is not a refinery. Further, the equipment that physically performs the "manufacturing" is basically only two types of valves within the dispenser unit. The first type of valve is a strainer/check valve for the fuel supply pipes that come from each of the two underground storage tanks. These valves prevent cross contamination from one grade of fuel entering the underground storage tank of the other grade of fuel. The second type of valve is a blend valve that mixes the premium- and regular-grade gasolines in a predetermined ratio to create the mid-grade gasoline. All of the grades of gasoline are then sent through a filter strainer before being discharged from the filler nozzle and into the customer's fuel tank.

The Department takes issue with the description of the service station manufacturing process as converting "raw fuel stock" into "a new and distinctly different finished product." The premium-grade and regular-grade gasolines are already fully-refined versions of the same fuel. Gate is not refining gasoline from crude oil. Further, the fact that the gasoline is filtered before being dispensed is insufficient to "bring about a change in the composition or physical nature," as provided by Rule 12A-1.096(1)(d), F.A.C. It should be noted that gasoline is filtered at least one more time after it leaves a motor vehicle's gas tank before it is ignited in the motor's cylinders. Those filters in the motor vehicle do not continue a manufacturing process.

If mid-grade gasoline is being "manufactured" at the service station, it is the customer and not Gate who causes mid-grade gasoline to be created by selecting a button at, or a nozzle from, the dispenser unit. The Department does not consider any type of self-service activity where a customer operates machinery or equipment to be a part of a manufacturing process. For example, self-service copy machines are not considered to be commercial printing equipment, nor are self-service coffee grinders in the coffee aisle of a grocery store considered to be manufacturing equipment. The fact that a customer-initiated activity can turn a retail service station into a manufacturing facility would be highly expansive, unreasonable, and contrary to legislative intent with respect to the tax exemption. "[A] statute should not be construed to bring about an unreasonable or absurd result and [it] should be construed to effectuate the intention of the legislature in enacting the statute." State v. Willis, 124 So.2d 48 (Fla. 1st DCA 1960).

Gate has made reference to several Technical Assistance Advisements (TAAs) in support of its claim for an exemption and refund. It is important to note that a TAA is only binding on the Department with respect to the specific taxpayer and the specific scenario or facts that have been addressed in the TAA. That said, the TAAs that were referenced in the letter of protest have been reviewed to make sure that the determinations, as presented in those advisements, are not contrary to the determination in this Notice of Decision. As a result of that review, it has been determined that the facts in those TAAs are sufficiently or substantially different from the facts in this Notice of Decision. The TAAs are concerned with traditional manufacturing facilities and do not address convenience store operations. Accordingly, the findings in those advisements are not applicable.

It has also been argued that the state of Texas is currently allowing an exemption on service station equipment. It is true that Texas has an ad valorem tax pollution control exemption that gas stations are eligible for. However, that Texas exemption is applicable to real and personal property that is "used wholly or partially" for pollution control. Further, Texas provides that where equipment both controls pollution and produces a "marketable product," only a partial determination is possible. The value of the exemption for such "Tier III" equipment is reduced by a formula based on the economic value of the equipment that is used to make the marketable product.

CONCLUSION

Gate's underground storage tank systems do not qualify as pollution control systems that are eligible for exemption under the provisions of Section 212.051(1), F.S. The equipment does not have as its primary purpose pollution control or abatement; it is for the storage and delivery of fuel. The equipment required by DEP is a minimum regulatory standard used to prevent pollution during routine commercial activity and does not control or abate pollution from an industrial or manufacturing process. Most importantly, gas storage and dispensation is a retail activity, not the type of industrial or manufacturing process covered by s. 212.051, F.S., and Rule 12A-1.096, F.A.C. Accordingly, the refund denial is sustained.

TAXPAYER APPEAL RIGHTS

This Notice of Decision of Refund Denial constitutes the final position of the Department unless a Petition for Reconsideration of Refund Denial is filed on a timely basis, in which event the

Notice of Reconsideration of Refund Denial will be the Department's final position. The requirements for a Petition for Reconsideration of Refund Denial are set forth below.

Pursuant to Section 72.011(2), F.S., and Rule Chapter 12-6, F.A.C., the assessment is final as of the date of this Notice of Decision of Refund Denial unless you file a written Petition for Reconsideration of Refund Denial postmarked within thirty (30) days of the date of this Notice of Decision of Refund Denial and addressed to Technical Assistance and Dispute Resolution, Post Office Box 7443, Tallahassee, FL 32314-7443. The Petition for Reconsideration of Refund Denial must contain new facts or arguments; otherwise, it is subject to dismissal.

Absent a timely-filed Petition for Reconsideration of Refund Denial, the refund denial reflected in the Notice of Decision of Refund Denial is final, and you have three alternatives for further review:

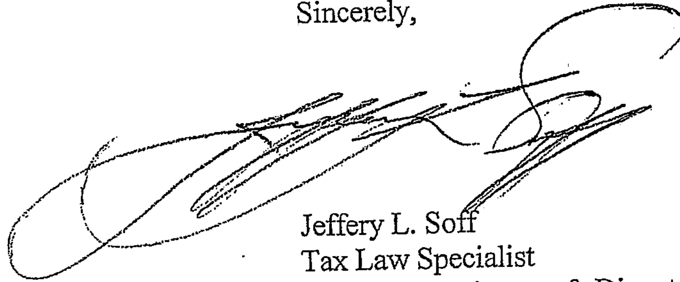
1) Pursuant to Section 72.011, F.S., you may contest the refund denial in circuit court by filing a complaint with the clerk of the court. THE COMPLAINT MUST BE RECEIVED BY THE CLERK OF THE CIRCUIT COURT WITHIN SIXTY (60) DAYS OF THE DATE OF THIS NOTICE OF DECISION OF REFUND DENIAL. The requirements of Chapter 72, F.S., are jurisdictional;

2) Pursuant to Sections 72.011, 120.569, 120.57, and 120.80(14), F.S., you may contest the refund denial in an administrative forum by filing a petition for a Chapter 120 administrative hearing with the Department of Revenue, Office of General Counsel, Post Office Box 6668, Tallahassee, FL 32314-6668. THE PETITION MUST BE RECEIVED BY THE DEPARTMENT WITHIN SIXTY (60) DAYS OF THE DATE OF THIS NOTICE OF DECISION OF REFUND DENIAL. The petition should conform to the requirements of the Uniform Rules promulgated pursuant to Section 120.54(5), F.S. Section 120.80(14), F.S., provides that before you file a petition under Chapter 120, F.S., you must pay to the Department the amount of taxes, penalties, and accrued interest that are not being contested. Failure to pay those amounts will result in the dismissal of the petition and imposition of an additional penalty in the amount of twenty-five percent of the tax assessed. Mediation pursuant to Section 120.573, F.S., is not available. The requirements of Section 72.011(2) and (3)(a), F.S., are jurisdictional for any action contesting an assessment or refund denial under Chapter 120, F.S.; OR

3) Pursuant to Section 120.68, F.S., you may contest the refund denial in the appropriate district court of appeal by filing a Notice of Appeal meeting the requirements of Rule 9.110, Florida Rules of Appellate Procedure, with i) the Clerk of the Department of Revenue, Office of General Counsel, Post Office Box 6668, Tallahassee, FL 32314-6668 and ii) with the clerk of the appropriate district court of appeal, accompanied by the applicable filing fee. THE NOTICE OF APPEAL MUST BE FILED WITH BOTH THE DISTRICT COURT OF APPEAL AND THE DEPARTMENT OF REVENUE WITHIN THIRTY (30) DAYS OF THE DATE OF THIS NOTICE OF DECISION OF REFUND DENIAL. For appellate review purposes, the Department will treat factual matters asserted in a protest or petition for reconsideration as allegations, not as established facts.

Should you have any further questions concerning this matter, please do not hesitate to contact me.

Sincerely,



Jeffery L. Soff
Tax Law Specialist
Technical Assistance & Dispute Resolution
(850)717-7347

NOTICE UNDER THE AMERICANS WITH DISABILITIES ACT

Persons needing an accommodation to participate in any proceeding before the Technical Assistance and Dispute Resolution Office should contact that office at 850-617-8346 (voice), or 800-DOR-8331 (TDD), at least five working days before such proceeding. You may also call via the Florida Relay System at 800-955-8771 (TDD).