

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

PACKAGED ICE, INC., )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 02-1110  
 )  
 DEPARTMENT OF REVENUE, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on May 31, 2002, by telephone,<sup>1</sup> with the Petitioner appearing in Fort Lauderdale, Florida, and the Respondent appearing in Tallahassee, Florida, before Patricia Hart Malono, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, who presided in Tallahassee, Florida.

APPEARANCES

For Petitioner: Joseph C. Moffa, Esquire  
Moffa & Gainor, P.A.  
100 Southeast Third Avenue  
One Financial Plaza, Suite 2202  
Fort Lauderdale, Florida 33394

For Respondent: R. Lynn Lovejoy, Esquire  
Office of the Attorney General  
The Capitol, Tax Section  
Tallahassee, Florida 32399-1050

STATEMENT OF THE ISSUE

Whether the Petitioner is liable for taxes, penalties, and interest as set forth in Issue I of the Notice of Decision dated January 13, 2002, and, if so, the amount owed.

PRELIMINARY STATEMENT

In a Notice of Decision dated January 13, 2002, the Department of Revenue ("Department") notified Packaged Ice, Inc. ("Packaged Ice"), that it owed the following tax assessments:

Source #: A0013106432-010  
Sales and Use Tax Audit Assessment  
Period: 06/01/95-05/31/00  
Proposed Assessment Amount: \$132,531.80  
Sustained Amount: \$132,531.80  
Balance Due: \* \$137,590.70

\*Includes payments and updated interest through 01/10/02. Interest continues to accrue at \$23.10 per day until the postmark date of payment.

Source #: A0013106432-013  
Sales and Use Tax Audit Assessment  
Period: 06/01/95-05/31/00  
Proposed Assessment Amount: \$ 6,653.53  
Sustained Amount: \$ 6,653.53  
Balance Due: \*\* \$ 6,907.57

\*\*Includes payments and updated interest through 01/10/02. Interest continues to accrue at \$1.16 per day until the postmark date of payment.

Source #: A0013106432-016  
Local Gov't Infrastructure Surtax Audit  
Assessment  
Period: 06/01/95-05/31/00  
Proposed Assessment Amount: \$ 102.54  
Sustained Amount: \$ 102.54  
Balance Due: \*\*\* \$ 106.92

\*\*\*Includes payments and updated interest through 01/10/02. Interest continues to accrue at \$0.02 per day until the postmark date of payment.

Source #: A0013106432-230  
Indigent Care Surtax Audit Assessment  
Period: 06/01/95-05/31/00  
Proposed Assessment Amount: \$ 161.09  
Sustained Amount: \$ 161.09  
Balance Due: \*\*\*\* \$ 167.66

\*\*\*\*Includes payments and updated interest through 01/10/02. Interest continues to accrue at \$0.03 per day until the postmark date of payment.

Source #: A0013106432-530  
School Capital Outlay Surtax Audit  
Assessment  
Period: 06/01/95-05/31/00  
Proposed Assessment Amount: \$ 44.96  
Sustained Amount: \$ 44.96  
Balance Due: \*\*\*\*\* \$ 47.15

\*\*\*\*\*Includes payments and updated interest through 01/10/02. Interest continues to accrue at \$0.01 per day until the postmark date of payment.

Packaged Ice timely filed a Petition for a Chapter 120 Hearing, in which it challenged the assessment of the sales and use tax, penalties, and interest associated with Source # A0013106432-010. This assessment was based on the Department's determination that Packaged Ice had failed to pay sales tax on monies received during the audit period for the lease of tangible personal property in Florida.<sup>2</sup> The Department forwarded the matter to the Division of Administrative Hearings

for assignment of an administrative law judge. Pursuant to notice, the hearing was held on May 31, 2002.

At the hearing, the Department presented its prima facie case through the testimony of Robert E. Desbiens, a tax auditor employed by the Department, and of Val Burgess, a tax law specialist employed by the Department. Respondent's Exhibit 1, consisting of the Department's audit file, was offered and received into evidence. Packaged Ice presented the testimony of Mark Steffek, the vice president of financing and treasurer of Packaged Ice, and of Brian Himes, the vice president of ice factory systems for Packaged Ice. Petitioner's Exhibits 1 through 7 were offered and received into evidence.

The one-volume transcript of the proceedings was filed with the Division of Administrative Hearings on June 21, 2002. An extension of time for filing Proposed Recommended Orders was granted, and the parties timely submitted proposed findings of fact and conclusions of law, which have been considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. The Department is the state agency authorized to administer and enforce the assessment and collection of

Florida's sales tax and to enact rules to enforce the provisions of Chapter 212, Florida Statutes. Section 212.18(2), Florida Statutes (2002).

2. The Department audited Packaged Ice in accordance with its standard audit procedures and calculated the assessment, interest and penalties using the standard procedures and methodology.

3. Packaged Ice paid to the Department the sum of \$5,000.00 for that portion of the assessment that is uncontested.

4. Packaged Ice is a Texas corporation and is the largest manufacturer and distributor of packaged ice in the United States. Packaged Ice has four subsidiaries, two of which are involved in its ice operations, and approximately 90 percent of its annual revenues derives from these operations. Packaged Ice's business practices relevant to the assessment at issue herein remained the same during the audit period and are still in effect at the present time.

5. Packaged Ice sells packaged ice for resale to retailers nationwide, primarily to large companies such as Albertsons, Krogers, Walmart, 7-Eleven, and Circle-K that operate chains of supermarkets and convenience stores (referred to collectively herein as "customers"). The typical Supply Agreement between

Packaged Ice as Seller and a customer as Buyer provides in pertinent part:

RECITALS

A. Buyer operates a chain of retail supermarket and drug stores ("Store" or "Stores" as appropriate) in various states and Seller is the manufacturer and marketer of packaged ice (block and/or cube) products for retail sales from Seller-owned merchandisers and/or in-store bagging equipment.

B. Buyer and Seller wish to enter into this Agreement under which Seller will supply Buyer with Seller's Reddy Ice brand and Buyer's private label packaged ice (block and/or cube)(collectively, "Products") and/or in-store bagging equipment (as determined by Buyer) to designated Stores as mutually agreed to by the parties, and to provide Seller-owned ice merchandisers for each Store, . . . .

6. Pursuant to its typical supply agreement, Packaged Ice agrees to "use its reasonable efforts to supply the needs of each Store as determined by Buyer and the movement of Product." The typical agreement gives the customer the option of having Packaged Ice supply ice either through direct store delivery of bagged ice or through in-store ice-bagging systems.

7. Direct store delivery involves the distribution of ice manufactured by Packaged Ice in traditional ice plants, where the ice is packaged in plastic bags. The bagged ice is loaded onto trucks, and delivered to the stores operated by Packaged Ice's customers.

8. Pursuant to the supply agreement, Packaged Ice installs an ice "merchandiser" in each store to which it delivers bagged ice, and Packaged Ice retains ownership of the merchandiser. The ice merchandiser is used to store and market the bagged ice to shoppers in the store:<sup>3</sup> When the bagged ice is delivered to the store, Packaged Ice's employee stacks the bags of ice in the merchandiser, where it is available to shoppers, who remove the bags of ice from the merchandiser and pay the store the retail price for the ice.

9. The store collects sales tax on each bag of ice that is sold at retail. The transaction whereby Packaged Ice delivers bagged ice to a store and places it into a merchandiser owned by Packaged Ice but installed in the store is treated by the Department as a sale for resale, and Packaged Ice is not required to remit sales tax on the transaction.

10. Sometimes a store orders more ice than can be stored in the merchandiser. This ice is stored in freezers located on the store's premises. In order to maximize the sale of bagged ice, the store's employees monitor the merchandiser, move bags of ice from the freezers into the merchandiser, and shift ice around in the merchandiser so that it is accessible to shoppers.

11. The costs associated with the delivery of packaged ice manufactured at traditional ice plants are approximately

one-third to one-half of the cost of a bag of ice. It is fairly expensive to transport ice because it is dense and heavy, and typically ice from a traditional ice plant can be delivered only within a radius of one hundred miles.

12. Packaged Ice's in-store ice-bagging system, also referred to as an in-store ice factory, is the alternative means by which Packaged Ice delivers bagged ice to its customers' stores for sale at retail. When Packaged Ice determines that the volume of a store's sales of bagged ice is sufficiently high, Packaged Ice will, at the customer's request, install a self-contained ice factory on the store's premises. Packaged Ice has installed approximately 2900 in-store ice factories throughout the country. Pursuant to the typical supply agreement, Packaged Ice is free to remove an ice factory from a customer's store at any time and commence direct store delivery of bagged ice, and Packaged Ice will remove an ice factory from a customer's store and commence direct store delivery of bagged ice whenever the customer requests that they do so.

13. The in-store ice factory consists of three parts: The top part of the system is the ice-making machine; the middle part of the system is the ice-bagging machine, and the bottom part of the system is the merchandiser. The merchandiser is identical to the merchandisers installed in stores to which

Packaged Ice delivers ice manufactured and packaged in a traditional ice plant. The ice-making machine and the ice-bagging machine sit on top of the merchandiser, so the entire system takes up no more floor space in a store than the merchandiser.

14. Cubes of ice are manufactured in the ice-making portion of the ice factory and dropped into a hopper. When space is available in the merchandiser for additional bags of ice, the ice-bagging machine releases eight pounds of ice from the hopper into an empty plastic bag and seals the plastic bag. The bag then drops into the merchandiser, where it is available to shoppers.

15. The ice factory is designed to manufacture and bag ice and drop the bagged ice into the merchandiser until the merchandiser is full. Once the merchandiser is full, the machine automatically stops making and bagging ice. The machine begins producing ice again when its sensors indicate that the merchandiser is no longer full.

16. Packaged Ice sells empty plastic bags to those of its customers opting to have ice factories installed in their stores. The bags can be customized with the customers' name and logo, and the bags are used in the ice-bagging machine to package the ice manufactured in the ice-making machine. The cost of the empty bags is the only cost to Packaged Ice's

customers that is associated with the operation of the ice factories. Because of the cost efficiencies in the manufacture of ice by in-store ice factories, in most cases, Packaged Ice's customers pay slightly less for each empty bag used in an ice factory than they pay for a bag of ice manufactured and bagged in a traditional ice plant and delivered to the customers' stores by truck.

17. Packaged Ice gives its customers credit for any bags that break or for any bags that, for whatever reason, cannot be sold because its customers are required to pay only for bags of ice that can be sold at retail at the customer's stores.

18. When Packaged Ice installs an ice factory in one of its customers' stores, either Packaged Ice is totally responsible for the installation, which is done either by its employees or by a subcontractor it hires. Packaged Ice pays all the expenses of installation, including the cost of the necessary permits and licenses, as well as the cost to install electrical outlets and a water connection to the store's electricity and water supply.

Thereafter, the electricity and water necessary for the operation of the ice-making and ice-bagging machines and of the merchandiser is provided by the store.

19. The price Packaged Ice charges its customers for a bag of ice is adjusted to reimburse the customers for the cost of the water and electricity used by the ice factory.

20. The ice factories located in the various stores are controlled exclusively by Packaged Ice, and they cannot be operated by the stores' employees. The ice-making and ice-bagging machines are connected to computers located in Texas using wireless technology, and Packaged Ice controls the production of ice via computers located in Texas. If a machine malfunctions, a signal is immediately sent to the Packaged Ice computers, where technicians can diagnose the problem and reset the machine. If the malfunction cannot be corrected by computer, Packaged Ice employs local technicians who are dispatched to store to repair the machine, and they generally arrive within four hours after having been dispatched.

21. In addition to repairing the machines when they malfunction, Packaged Ice's local technicians go on-site at least once each week to check each ice factory; during peak season, Packaged Ice's local technicians check each ice factory four or five times a week, and each day during periods of extremely high sales volume, to ensure that each ice factory is working properly and producing quality bagged ice in sufficient quantities to meet the needs of its customers.

22. Packaged Ice's local technicians have the following responsibilities with respect to the in-store ice factories: They deliver boxes of empty bags to the store, load the empty bags into cassettes,<sup>4</sup> and load the cassettes into the ice-bagging machine; they rearrange ice in the merchandiser to clear the area underneath the ice-bagging machine, where the bagged ice tends to form a pyramid,<sup>5</sup> and move bags of ice to the front of the merchandiser so they are more accessible to shoppers; and they clean and sanitize the machines and perform any maintenance necessary to ensure that they are in proper working condition.

23. When the ice factories cannot meet the demand for bagged ice or when the ice factories are not manufacturing bagged ice due to a malfunction, Packaged Ice supplies bagged ice by direct store delivery to ensure that its customers' stores have sufficient supplies of bagged ice to meet demand.

24. When an ice factory is installed, Packaged Ice provides a training program for store employees, the purpose of which is to teach the store employees how to assist in maximizing the potential of the ice factory to manufacture bagged ice for retail sale. Packaged Ice suggests, but does not require, that store employees

- a) Front and properly stack the ice machine as needed, about every 6-8 hours. . . .
- b) Don't let the production unit pyramid and shut off. Assign personnel to take bags from the production machine and

fill your In-Line display or satellite boxes each night, this insures a constant production of ice.

- c) Load bags if necessary.
- d) Cooperate and assist the Package Ice Retail Merchandisers in planning ice reserves for key weekends and holidays.
- e) Only pull ice from the reserve stock if needed and only load ice in the front row of the production machine. Filling the rear or second row will shut off the capability of the machine to produce product.
- f) Visual check of the production unit frequently to ensure proper operation. The machine will alert store personal [sic] with a flashing light if there is a production interruption.
- g) Should a problem arise, call Package Ice Company immediately at . . . .<sup>[6]</sup>

25. With few exceptions, the responsibilities of the store employees would be the same if Packaged Ice delivered ice to the store under the direct delivery system rather than by the in-store ice factory: Store employees would be required to load, stack, and shift bagged ice in the merchandiser; they would assist in planning for reserves of bagged ice to be available during times of high demand; and they would move bagged ice from the reserves held in the store's freezer to the merchandiser when the supply of bagged ice in the merchandiser was low.

26. Store employees load a cassette of empty bags only rarely, when demand is high and the machine runs out of bags between service calls by Packaged Ice's local technician. In addition, it is not necessary for store employees to monitor the

operation of the ice factory, and few stores call Packaged Ice to report a problem because the store employees are aware that Packaged Ice is immediately alerted if there is a problem.

27. Packaged Ice records the revenue from the sales of empty bags for use in ice factories as sales of bagged ice, and it includes in its annual reports the overall tonnage of ice produced both in its traditional ice plants and in the ice factories installed in its customers' stores.

28. Based on the information provided by Packaged Ice, the Department determined that, during the period covered by the audit, Packaged Ice was engaged in leasing tangible personal property when it installed ice factories in their customers' stores and that Packaged Ice was required under Florida law to pay sales tax on the proceeds of these leases. The Department rejected Packaged Ice's contention that it was actually manufacturing and delivering bagged ice to its customers for resale by means of the ice factories and as an alternative to direct store delivery of bagged ice, concluding instead that Packaged Ice's customers had custody and possession of the ice factories because they were installed on property owned or leased by Packaged Ice's customers and that the customers had control over the ice factories because they could stop the production of ice at any time by disconnecting the ice factory from its water and electricity supply.

29. Because the only cost to Packaged Ice's customers associated with the ice factories is the price paid to Packaged Ice for empty plastic bags, the Department decided that the amount paid for the empty bags was representative of the consideration paid for the lease of the machines, and it used these figures to calculate sales tax owed by Packaged Ice. According to the Department's calculations, which have not been challenged, Packaged Ice owes sales tax in the amount of \$70,266.69. The Department imposed the maximum penalty of \$35,132.72, or 50 percent of the tax owed, and the final assessment included interest on the amount of the tax through January 10, 2002, for a total assessment of \$137,590.70.<sup>7</sup>

#### Summary

30. The ice factories installed by Packaged Ice in the stores of its customers are pieces of tangible personal property. However, the uncontroverted evidence of the terms of the supply agreements between Packaged Ice and its customers and of the ordinary and customary course of conduct between Packaged Ice and its customers is sufficient to refute the Department's determination that the installation of the ice factories constitutes the lease of tangible personal property.

31. The uncontroverted evidence establishes that the agreements between Packaged Ice and its customers are for the delivery of bagged ice and that, pursuant to the agreements, the

customers that have elected to have ice factories installed on the premises of their stores have done so as an alternative to having Packaged Ice deliver to the stores bagged ice manufactured and packaged in traditional ice plants. The uncontroverted evidence also establishes that it is Packaged Ice's intent to deliver bags of ice to its customers' stores through the mechanism of an in-store ice factory, as a cost-effective alternative to the delivery of bagged ice manufactured and packaged in traditional ice plants. Likewise, the evidence is sufficient to support the inferences that it is the intent of Packaged Ice's customers to purchase bagged ice manufactured in the in-store ice factories and that they do not intend to take possession, custody, or control over the machines in order that they might, themselves, manufacture bagged ice.

32. The uncontroverted evidence establishes that Packaged Ice installs ice factories on property owned or leased by its customers. However, the evidence is sufficient to establish that, in so doing, Packaged Ice does not turn over to its customers custody or possession of the ice factories or the right to use or control the ice factories in any meaningful sense. An in-store ice factory has no intrinsic value to a customer: The only value the customer derives from having an in-store ice factory is the product it delivers - bagged ice

available for the customer to sell at retail. Without Packaged Ice's intervention as the operator of the ice-making and ice-bagging machines, its customers would possess nothing more than a merchandiser in which bagged ice could be stored and presented for sale. Significantly, the Department apparently does not consider the installation of ice merchandisers owned by Packaged Ice in its customers' stores as the lease of tangible personal property, since it has not included in its assessment sales tax attributable to any "lease" of the merchandisers alone. Rather, the Department treats the delivery of bagged ice to a store that has only a merchandiser as a sale of bagged ice for resale.

33. The uncontroverted evidence establishes that Packaged Ice controls all aspects of the production of bagged ice by the in-store ice factories and that it is responsible for maintaining, servicing, and repairing the ice factories. The employees of the stores in which the ice factories are installed are asked to do little more than they would do in handling bagged ice delivered to the store by truck and stored in an ice merchandiser furnished by Packaged Ice.

34. Finally, although the uncontroverted evidence establishes that Packaged Ice's customers provide the electricity and water necessary to operate the in-store ice factories and that Packaged Ice's customers can cut off the

supply of electricity and water to the ice factories, the exercise of this power certainly does not give Packaged Ice's customers the right to use the ice factories, nor does it give Packaged Ice's customers meaningful control of the operation of the ice factories. Cutting off the supply of electricity and water to the ice factory can only stop the manufacture and bagging of ice and cause the ice merchandiser to be unsuitable for storing bagged ice for sale. The customers cannot, under any circumstances, cause the ice factories to manufacture and bag ice without the intervention of Packaged Ice.

#### CONCLUSIONS OF LAW

35. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 72.011, 120.569, and 120.57(1), Florida Statutes (2002).

36. Section 120.80(14)(b)2., Florida Statutes, provides that, in an administrative proceeding initiated pursuant to Section 72.011(1), Florida Statutes, "the applicable department's burden of proof, except as otherwise specifically provided by general law, shall be limited to a showing that an assessment has been made against the taxpayer and the factual and legal grounds upon which the applicable department made the assessment." The Department has met its burden of establishing

the factual and legal basis on which it based its sales tax assessment against Packaged Ice.

37. Once the Department has satisfied its burden of establishing the factual and legal basis for its assessment, the burden shifts to the taxpayer to prove by a preponderance of the evidence that the assessment is incorrect. See Department of Revenue v. Nu-Life Health and Fitness Center, 623 So. 2d 747, 751-52 (Fla. 1st DCA 1993); Section 120.57(1)(j), Florida Statutes.

38. In Section 212.05, Florida Statutes, the Florida Legislature has stated its intent to levy a tax on the sale of tangible personal property:

It is hereby declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this state, including the business of making mail order sales, or who rents or furnishes any of the things or services taxable under this chapter, or who stores for use or consumption in this state any item or article of tangible personal property as defined herein and who leases or rents such property within the state.

(1) For the exercise of such privilege, a tax is levied on each taxable transaction or incident, which tax is due and payable as follows:

(a)1.a. At the rate of 6 percent of the sales price of each item or article of tangible personal property when sold at retail in this state, computed on each taxable sale for the purpose of remitting

the amount of tax due the state, and including each and every retail sale.<sup>[8]</sup>

39. A "retail sale" is "a sale to a consumer or to any person for any purpose other than for resale in the form of tangible personal property . . . ." Section 212.02(14)(a), Florida Statutes.

40. The lease of tangible personal property is considered the sale of tangible personal property for purposes of Florida's sales tax. Section 212.02(15), Florida Statutes ("'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.").

41. A "lease" is defined in pertinent part in Section 212.02(10)(g), Florida Statutes, as "the leasing or rental of tangible personal property and the possession or use thereof by the lessee or rentee for a consideration, without transfer of title of such property, . . ."

42. "'Use'" means and includes the exercise of any right or power over tangible personal property incident to the ownership thereof, or interest therein, except that it does not include the sale at retail of that property in the regular course of business." Section 212.02(20), Florida Statutes.

43. The Department's Rule 12A-1.071, Florida

Administrative Code, provides as follows:

(1)(a) For purpose of this rule, the term "lease" includes any rental or license to use tangible personal property, unless a different meaning is clearly indicated by the context in which it is used. The term refers to all transactions that are not bailments in which there is a transfer of possession of tangible personal property, without regard to limitations upon the use, for a consideration, without a transfer of title to the property. . . . All leases of tangible personal property other than conditional-sale type leases as described in paragraph (1)(d) of this Rule, are operating leases. . . .

(b) Transfer of possession with respect to an operating lease means that one of the following attributes of tangible personal property ownership has been transferred:

1. Custody or possession of the property, actual or constructive;
2. The right to custody or possession of the property; or,
3. The right to use and control or direct the use of the property.

\* \* \*

(10)(a) A transaction involving the use of equipment with an operator supplied by the owner of the equipment is a lease if control or direction over the use of the equipment passes to the customer.

44. Based on the findings of fact herein, a reasonable interpretation of the statutory and rule definitions above compels the conclusion Packaged Ice is not subject to payment of sales tax for ice factories installed on premises owned or

leased by its customers because Packaged Ice is not, thereby, leasing tangible personal property.

45. "[I]t is a fundamental rule of construction that the authority to tax must be strictly construed against the taxing authority and in favor of the taxpayer and all ambiguities or doubts must be resolved in favor of the taxpayer." Warning Safety Lights of Georgia, Inc. v. State, Department of Revenue, 678 So. 2d 1377, 1379 (Fla. 4th DCA 1996).

46. In this case, the only arguable "transfer of possession" of the ice factories from Packaged Ice to its customers is the placement of the machine on the store premises. The facts of this case, although they involve the delivery of a product rather than the delivery of a service, can be analogized to the facts in American Video Corp. v. Lewis, 389 So. 2d 1059, 1061 (Fla. 1st DCA 1980). The court in American Video considered whether the items of equipment placed in a customer's home to enable a company to provide television cable services to the customer were rented to the customer and, therefore, subject to the sales tax. The court concluded that the cable company did not rent tangible personal property, observing that the various pieces of equipment placed in a customer's home to facilitate the delivery of cable services were

unused, unusable and of no value in and of themselves to the customer, so as to support payment of a separate consideration for

their possession, until such time as appellant [cable company] makes the proper connections to its system so that the customer can watch cable T.V. For this, and nothing else, the customer pays a consideration . . . .

Id. at 1061.

47. Similarly, the ice-making and ice-bagging machines installed by Packaged Ice in its customers' stores as part of the ice factories are unusable and of no value in and of themselves. They only become usable when Packaged Ice operators cause them to manufacture and bag ice.<sup>9</sup> The consideration paid by Packaged Ice's customers is for a bag of ice and not for an empty bag or for the possession or use of the ice factory. Packaged Ice installs in-store ice factories at the request of its customers solely as an alternative method of delivering bags of ice to its customers, which the customers then sell at retail.<sup>10</sup> As was the case in American Video, Packaged Ice is not engaged in leasing tangible personal property but is using the property to deliver a product to its customers.

48. The case of S & W Air Vac Systems, Inc. v. Department of Revenue, 697 So. 2d 1313 (Fla. 5th DCA 1997), does not, as the Department contends, support the conclusion that Packaged Ice is engaged in leasing tangible personal property. The court in that case held that the owner of coin-operated vacuum systems installed on concrete pads at convenience stores, for which the

owner paid the convenience store a portion of the gross proceeds from the machines, owed use tax as the licensee of real property.

49. The Department included in its audit file a copy of the decision of the Comptroller of the State of Texas, Decision 23,447, rendered September 29, 1988, and the Department's witness testified that this decision was considered persuasive by the Department in reaching its determination that installation of ice factories constituted the lease of tangible personal property. The reasoning of the Texas Comptroller in this decision has been considered and found not helpful in resolving the instant case. The Texas Comptroller concludes in Decision 23,447 that the ice factory, not bags of ice, was the focus of the agreement between the Texas taxpayer and its customers. In the instant case, the terms of the supply agreement Packaged Ice enters into with its customers make it clear that the delivery of bagged ice is the purpose of the agreement. In addition, the facts included in the comptroller's decision do not specify the extent to which the Texas taxpayer exercised control over the operation, maintenance, and repair of the ice factory, so it cannot be determined that the comptroller was faced with the same facts as those in the instant case. Finally, it appears that, based on the Policy Statement: Sales Tax included in the Department's audit file, Texas has reversed

its previous position and now treats the method of delivering ice by in-store ice factories as the sale of bags of ice.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Revenue enter a final order finding that Packaged Ice, Inc., is not engaged in leasing tangible personal property in Florida and withdrawing the assessment of \$137,590.70 in sales and use tax, penalties, and interest associated with Source #A0013106432-010.

DONE AND ENTERED this 27th day of August, 2002, in Tallahassee, Leon County, Florida.

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PATRICIA HART MALONO  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 27th day of August, 2002.

ENDNOTES

<sup>1/</sup> The final hearing was scheduled to take place by video teleconference, however, this was not possible due to technical problems with the equipment. The parties consented to conduct the hearing by telephone.

<sup>2/</sup> Although Packaged Ice also objected in its petition to the assessment of all penalties identified in the Notice of

Decision, it is assumed that this issue was abandoned by Packaged Ice because no evidence was offered with respect to the penalties imposed on the four assessments that were not challenged, nor was it addressed in Packaged Ice's Proposed Recommended Order.

<sup>3/</sup> Although there was no evidence on this point, the installation of a merchandiser would presumably require the installation of an electrical outlet to supply electricity for the merchandiser since it is, in essence, a freezer in which the bagged ice is stored pending its sale.

<sup>4/</sup> Empty bags for the ice-bagging machine are delivered in bulk in cardboard boxes. Before they can be installed into the ice-bagging machine, they must be loaded into a cassette. Store employees are not trained to load empty bags into the cassette, and this may only be done by a Packaged Ice technician.

<sup>5/</sup> When the pyramid of bags of ice reaches a certain level, a sensor is activated that stops the production and bagging of ice.

<sup>6/</sup> Petitioner's Exhibit 2.

<sup>7/</sup> The Department included in its Proposed Recommended Order proposed findings of fact and conclusions of law related to Packaged Ice's failure to register as a "dealer" in Florida, for purposes of collecting sales tax and/or resale certificates. The Department's witness conceded that the factual and legal grounds for the assessment did not relate to Packaged Ice's registration in Florida and that the amount of the assessment would remain the same regardless of whether Packaged Ice was or was not a registered dealer in Florida. Therefore, this issue will not be addressed in this Recommended Order.

<sup>8/</sup> There is no dispute that the ice factories are tangible personal property. See Section 212.02(19), Florida Statutes.

<sup>9/</sup> Although the ice merchandiser that forms part of the ice factory is usable in and of itself to store and market bagged ice, the Department apparently recognizes that the only purpose of the ice merchandiser is to store and market the bagged ice Packaged Ice delivers to the store for resale by the store at retail.

<sup>10/</sup> Contrary to certain assertions by the Department in its Proposed Recommended Order, this case does not involve the issue of whether Packaged Ice is entitled to an exemption for the sale of bagged ice for resale. The issue presented in the assessment challenged herein is whether it is engaged in leasing tangible personal property.

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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.