

Note: Exemption List (Exhibit B) attached.

Jan 27, 1987

IN RE: DOR 84-2A  
Jacksonville Electric Authority And  
Florida Power & Light Company,  
Co-Owners Of St. Johns River Power  
Park, Units One And Two

PETITION FOR DECLARATORY STATEMENT

AMENDED DECLARATORY STATEMENT

Petitioners, Jacksonville Electric Authority and Florida Power & Light Company, Co-owners of St. Johns River Power Park, Units One and Two, request a Declaratory Statement from the Department of Revenue relative to the exemption from Florida sales and use tax of purchases of certain items and systems to be used in connection with the construction of the St. Johns River Power Park, Units One and Two (hereinafter referred to as the "Facility").

The following description of the Facility has been provided by the Petitioners:

B - Description of Facility.

SJRPP consists of two 612 megawatts coal-fired electric generating units together with all necessary apparatus, equipment, materials and appurtenances necessary and appropriate for satisfactory operating of the units. Each of the units at SJRPP will include a steam generator, turbine generator, air quality control system, circulating water system, and associated equipment for each major component. Facilities common to each unit are the chimney, switchyard, fuel and materials handling system, and the water and waste management systems. External to the rail

loop is an area of land for the potential disposal of solid waste from the by-products of combustion and flue gas desulfurization and for environmental buffer areas.

The Petitioners, as a part of their Petition for Declaratory Statement, have attached a list of items and systems as Exhibit A (hereinafter referred to as the "Original Exhibit A") which Petitioners assert consist of machinery and equipment necessary in the production of steam energy by the Facility. By letter dated May 17, 1984, Petitioners submitted an additional Exhibit A (hereinafter referred to as the "Supplemental Exhibit A"), in response to a request by the Department of Revenue for additional descriptive information with respect to the items and systems listed on the Original Exhibit A attached to the Petition for Declaratory Statement. For ease of reference, the items and systems listed on the original Exhibit A have been numbered 1 through 96 on the attached copy of the original Exhibit A.

In the Petitioners' letter of May 17, 1984, Petitioners indicated the following clarification with regard to the use of the supplemental Exhibit A:

Please note that the title of certain of the items and systems listed on the Original Exhibit A to the Petition for Declaratory Statement with respect to coal handling machinery and equipment have been changed. In particular, the systems described as Crusher House SWGR Room, CH-Unloading Equipment, Transfer House #1, TH #1-Unloading Equipment, Transfer House #2, and TH #2-Unloading Equipment have been deleted. These items are included in the descriptions titled Coal Handling Building, Coal and Limestone Handling Switchgear Building and Transfer House "C".

As a part of the Petition for Declaratory Statement, Petitioners requested a hearing before the Department of Revenue. On June 8, 1984, a public hearing was conducted by Tom Swindal, Assistant Director of the Division of Audits, on behalf of the Department of Revenue. During the hearing, the Petitioners provided additional information and documentation

concerning the items and systems under review. Additionally, Petitioners presented their position with regard to the applicable law and a document entitled "Comments of Jacksonville Electric Authority".

The declaratory statement requested by the Petitioners, as set out on page 5 of the Petition for Declaratory Statement, is as follows:

Petitioners seek a Declaratory Statement of the Department of Revenue that the machinery and equipment which constitute the items and systems listed on Schedule A attached hereto are exempt from the tax imposed by Section 212 pursuant to Section 212.08(5)(c), F.S.

Section 212.08(5)(c), Florida Statutes (1983), provides:

212.08 Sales, rental, use, consumption, distribution, and storage tax; specific exemptions. -- The sale at retail, the rental, the use, the consumption, the distribution, and the storage to be used or consumed in this state of the following tangible personal property are hereby specifically exempt from the tax imposed by this chapter.

\* \* \* \*

(5) EXEMPTIONS: ACCOUNT OF USE. --

\* \* \* \*

(c) Machinery and equipment used in production of electrical or steam energy.-- The purchase of machinery and equipment for use at a fixed location, which equipment and machinery are necessary in the production of electrical or steam energy resulting from the burning of boiler fuels other than residual oil, is exempt from the tax imposed by this chapter. Such electrical or steam energy must be primarily for use in manufacturing, processing, compounding, or producing for sale items of tangible personal property in this state. However, the exemption provided for in this paragraph shall not be allowed unless the purchaser signs an affidavit stating that the item or items to be exempted are for the exclusive use designated herein....

In addition, subsequent to the opinion of the First District Court of Appeal in Jacksonville Electric Authority and Florida Power and Light v. Department of Revenue, the Petitioner filed an amendment to their petition requesting the declaratory statement be expanded to include the turbine-generator and accessory equipment.

The Petitioners have focused primarily upon three words or phrases in Section 212.08(5)(c), Florida Statutes (1983), in determining the intent of the Legislature: "necessary," "in" and "machinery and equipment". As to the term "necessary" the Petitioners argue that this term should be interpreted to mean "all machinery and equipment needed, both mechanically and legally, in production of steam energy". Further, Petitioners argue on page 3 of their Petition:

The Florida Supreme Court has stated that "[i]t is a basic axiom of statutory construction that words of common usage, when appearing in a statute, should be construed in their plain and ordinary sense". State v. Cormier, 375 So.2d 852, 854 (Fla. 1979). Webster's Collegiate Dictionary, C. & C. Merriam Co. (1981), defines the word "necessary" as "an indispensable item, essential". As an adjective, "necessary" is defined as "logically unavoidable, absolutely needed, required". Petitioners submit that the machinery and equipment constituting the items and systems listed on Schedule A are "required" for the Petitioners to produce steam energy.

As to the term "in" the Petitioners argue at page 4 of their Petition:

Moreover, Section 212.08(5)(c), F.S., quote above, states that the exemption applies to machinery and equipment "necessary in the production of", not "necessary for the production of". As a result, any machinery and equipment logically required and essential to produce steam energy should be exempt. Thus, the exemption should not be limited to machinery and equipment physically producing steam energy, but must also include machinery and equipment ancillary to the production of steam energy, such as

equipment utilized to move coal to the boiler, without which steam energy could not be produced. The statutory language does not support a contrary position.

Finally, with regard to the words "machinery and equipment" the Petitioners refer to the definition of these words found in Section 212.08(5)(b) and 212.08(5)(d), Florida Statutes (1983). According to Petitioners, these sections define "machinery and equipment" as "Section 38 property". Petitioners argued at the public hearing on this matter the following with regard to "section 38 property":

Under Section 48(a)1(b)i, of the Internal Revenue Code, and the regulations of the Internal Revenue Code has promulgated, Section 38 property includes more than just tangible personal property, but includes structures which are an integral part of the production of electrical energy.

The IRS regulations define a structure that is not a building to include essential items of equipment, which are integral parts of an activity. These things, which are probably a misnomer, the way they are described in our exhibit as buildings, are not buildings with the meaning under Section 48 of the Internal Revenue Code. They are really just structures, there is no human activity that goes on in the buildings, they are merely part of the equipment and machinery or part of the process that goes on inside the structure.

The Department of Revenue agrees that the words emphasized by the Petitioners are significant and that words of common usage must be construed in their plain and ordinary sense. In determining the meaning of the words utilized by the statute, several rules of statutory construction must be applied in determining the intent of the Legislature in enacting Section 212.08(5)(c), Florida Statutes (1983). The first such rule is the cardinal rule of statutory construction that the entire statute under consideration must be considered in determining the intent of the Legislature and effect must be given to every part of the provision being construed. State v. Gale

Distributors, Inc., 349 So.2d 150 (Fla. 1977).

Closely related to this rule of statutory construction is the doctrine of construction noscitur a sociis. That is, the meaning of a particular word in a statute should be determined by reference to words associated with it in the statute. See Carraway v. Armour & Co., 156 So.2d 494 (Fla. 1963).

In determining the meaning of the statute under review, it is also significant that Section 212.08(5)(c), Florida Statutes (1983), is a tax exemption statute. As such, it must be strictly construed against any person claiming the exemption. Tropical Shipping & Construction Co., Ltd., v. Askew, 364 So.2d 433 (Fla. 1978), Department of Revenue v. Skop, 383 So.2d 678 (Fla. 5th DCA 1980), Wanda Marine Corp. v. Department of Revenue, 305 So.2d 65 (Fla. 1st DCA 1974); and Sugar Cane Growers Coop. of Fla. v. Florida Rev. Comm., 179 So.2d 393 (Fla. 2d DCA, 1965).

Turning to the language of Section 212.08(5)(c), Florida Statutes (1983), it is evident that the Legislature did not intend to exempt every item purchased by a taxpayer which may be related to the production of steam or electrical energy. Several conditions must be met in order for the purchase of an item to qualify for exemption from sales tax (hereinafter referred to as the "Conditions for Exemption"):

1. "Machinery and equipment" must be purchased;
2. The machinery and equipment must be purchased for use at a fixed location;
3. The machinery and equipment must be "necessary in the production of electrical or steam energy";
4. The electrical or steam energy must be the result of burning boiler fuels other than residual oil;
5. The electrical or steam energy must be produced primarily for use in manufacturing, etc., for sale, items, of tangible personal property in this state;  
and
6. The purchaser must sign an affidavit stating that the item or items to be exempted are for the exclusive use designated in the statute.

Petitioners have indicated that all of the items and systems listed on the Original Exhibit A and in their amended petition constitute "machinery and equipment". In support of their position, Petitioners, have argued that the terms "machinery and equipment" are synonymous with "Section 38 property", as defined in Section 48(a)(b)(B)(i) of the Internal Revenue Code of 1954, as amended, and "includes more than just tangible personal property, but includes structures which are an integral part of the production of electrical energy". In support of their position, Petitioners rely on Sections 212.08(5)(b) and 212.08(5)(d), Florida Statutes (1983).

Section 212.08(5)(b), Florida Statutes, provides an exemption for "industrial machinery and equipment" used to increase productive output. The terms "industrial machinery and equipment" are defined in Section 212.08(5)(b)6.a., Florida Statutes (1983), as follows:

6. For purposes of the exemptions provided in subparagraphs 2. and 2., these terms have the following meanings:
  - a. "Industrial machinery and equipment" means "section 38 property" as defined in s.48(a)(1)(A) and (B)(i) of the Internal Revenue Code.... [Emphasis added]

Section 212.08(5)(d), Florida Statutes (1983), exempts "industrial machinery and equipment" used under federal procurement contracts. The definition of "industrial machinery and equipment" contained in Section 212.08(5)(d)4.e., Florida Statutes (1983), is almost identical to the definition contained in Section 212.08(5)(b)6.a., Florida Statutes (1983), quoted above.

The provisions relied upon by the Petitioners make it abundantly clear that the Legislature did not intend the terms "machinery and equipment" as used in the exemption provision under review to include Section 38 property. The terms used by the Legislature in Sections 212.08(5)(b) and 212.08(5)(d), Florida Statutes (1983), are "industrial machinery and equipment". Section 212.08(5)(c), uses the terms "machinery and equipment". Additionally, the definition of "industrial

machinery and equipment" is specifically limited for purposes of the exemptions provided for in Sections 212.08(5)(b) and 212.08(5)(d), Florida Statutes (1983). Section 212.08(5)(b)6.a., provides that the definition contained therein is "[f]or purposes of the exemptions provided in subparagraphs [212.08(5)(b)]1. and [212.08(5)(b)]2..." Section 212.08(5)(d)4.d. provides that the definition contained therein is "[f]or purposes of this paragraph (212.08(5)(d))...".

Finally, the fact that the Legislature specifically provided that industrial machinery and equipment means Section 38 property in Sections 212.08(5)(b) and 212.08(5)(d), Florida Statutes (1983), and did not similarly so provide in Section 212.08(5)(c), Florida Statutes (1983), is a clear indication that the Legislature did not intend that the terms "machinery and equipment" mean Section 38 property.

Condition for Exemption 2 listed above has not been discussed to any significant extent. Almost all of the items and systems which are the subject of this petition are to be used at a fixed location.

The third Condition for Exemption listed above, is that the machinery and equipment must be "necessary in the production of electrical or steam energy". Petitioners have asserted that the term "necessary" should be interpreted to mean "all machinery and equipment needed, both mechanically and legally, in production of steam energy". In support of this position, Petitioners argue that the term "necessary" means an indispensable item, essential and the term "in" means "with respect to, or with regard to". According to Petitioners, the term "in" does not mean "for".

The word necessary has been defined as follows:

This word must be considered in the connection in which it is used, as it is a word susceptible of various meanings. It may import absolute physical necessity or inevitability, or it may import that which is only convenient, useful, appropriate, suitable, proper, or conducive to the end sought. It is an adjective expressing degrees, and may

express more convenience or that which is indispensable or an absolute physical necessity. It may mean something which in the accomplishment of a given object cannot be dispensed with, or it may mean something reasonably useful and proper, and of greater or lesser benefit or convenience, and its force and meaning must be determined with relation to the particular object sought. Kay County Excise Board v. Atchison, T. & S.I.R. Co., 185 Okl. 327, 91 P.2d 1087, 1088.

Black's Law Dictionary 1181.

In the document entitled "Comments of Jacksonville Electric Authority", filed by attorneys for Jacksonville Electric Authority, several court decisions cited in 28 Words and Phrases, Necessary, have been cited. Although none of the cited cases are directly on point, they do indicate that the term "necessary" does not always mean "an indispensable item, essential". For example, in Indiana Broadcasting Corp. v. Star Stations of Indiana, 388 N.E. 2d 568, 573 (Ind. 4th DCA, 1979), the court stated:

"Necessary" does not have an exact meaning. It is flexible and relative; it is an adjective expressing degree. The degree may range from mere convenience to that which is indispensable....

As the definition of "necessary" in Black's Law Dictionary, the cases cited by Petitioners and other cases cited in 28 Words and Phrases, Necessary, clearly show, the term by itself may mean anything from mere convenience to indispensable. In order to determine its meaning, the context in which it is used must be considered.

In this situation, the key phrase is "necessary in production". The term "production" is defined as "the act or process of producing... the creation of utility... the making of goods available for human wants". Webster's New Collegiate Dictionary, 918 (1976).

In Atwater v. Gaylord, 63 Wyo. 492, 184 P.2d 437 (1947),

the court indicated that "production" denotes the creation of something. Thus "production" is the act or process of creating something.

In this matter, the exemption is available for machinery and equipment "necessary in [the act or process of creating] steam or electrical energy". Based upon this definition and interpreting Section 212.08(5)(c), Florida Statutes (1983), strictly against the taxpayer, it is the conclusion of the Department of Revenue that only those items and systems listed on the Original Exhibit A as clarified by the Supplemental Exhibit A and in the amended petition which are actually used or to be used in the process of producing steam or electrical energy qualify for exemption. This conclusion holds whether the term "necessary" was intended to mean mere convenience or absolutely indispensable.

There does not appear to be any significant dispute over the fourth, fifth and sixth Conditions for Exemption. The items and systems listed on the Original Exhibit A which the Department of Revenue concluded in this Declaratory Statement are exempt, however, are exempt only if the steam energy or electrical energy they produce results from the burning of boiler fuels other than residual oil, the steam energy produced is primarily for use in electrical energy (tangible personal property) for sale in this State and an affidavit stating that the item or items to be exempt are for the exclusive use designated in Section 212.08(5)(c), Florida Statutes (1983).

One additional condition not specifically included in Section 212.08(5)(c), Florida Statutes (1983), must be met in order for the exemption to apply. Section 212.051, Florida Statutes (1983), provides:

Notwithstanding any provision to the contrary, sales, use, or privilege taxes shall be collected with respect to any facility, device, fixture, equipment or machinery used primarily for the control or abatement of pollution or contaminants from manufacturing or industrial plants or installations, and any structure, machinery or equipment installed in the reconstruction or replacement of such

facility, device, fixture, equipment or machinery.

As a result of the opinion of the First District Court of Appeal entered in the case of Jacksonville Electric Authority v. Department of Revenue, and Florida Power & Light Company v. Department of Revenue, dated March 31, 1986, the Department of Revenue and the parties to this action have reviewed all documents originally presented to the Department as well as the tapes of the legislative hearings and amendments to the appropriate legislative bills in an attempt to accurately ascertain the legislative intent behind the exemption.

It does appear from the materials available from the legislative libraries and the Division of Archives that the intent of the Legislature was, in fact, to encourage the modification of existing industries in Florida to provide for less dependency upon foreign oils by encouraging replacement of existing boilers and plant operations to develop and utilize other alternative fuels in the production of products and in the production of electricity. It appears from the materials available to the Department that the Florida Legislature sought to give every encouragement to the utilities and other major fuel burners to build factories that would rely upon non-petroleum fuels.

The tapes and transcripts of the legislative hearings on this exemption appear to adopt the concept of an exemption for "systems". The May 27, 1980 Senate Committee hearing on HB 1506 discloses an amendment to that bill which clearly evidences an intent to encourage the or converting of systems to use alternative fuels. This intent, as noted by the First District Court of Appeal, "sounds much like the integrated plant theory" proposed by Jacksonville Electric Authority and Florida Power and Light. 486 So.2d at 1354.

Under the integrated plant theory, it is necessary to look at whether the disputed items operate harmoniously with currently exempt machinery to make an integrated and synchronized system. Niagara Mohawk Power Corp. v. Wanamaker, 144 N.Y.S.2d at 461.

Upon review of the Court's opinion, as well as the

information gleaned from a review of the legislative journals and tapes of the legislative hearings, it is now the Department's position that the intent of the Legislature in passing s. 212.08(5)(c), F.S., was to adopt the integrated plant theory as the litmus test to be used in determining the extent of any exemptions under that section.

In an attempt to resolve all of the issues arising out of the original petition for declaratory statement filed by Florida Power and Light and Jacksonville Electric Authority, at the Department's request, Jacksonville Electric Authority and Florida Power & Light submitted an amendment to the petition suggesting that the turbine-generator and accessory equipment also qualify for the exemption from sales tax provided in s. 212.08(5)(c), F.S., because the electrical equipment produced by the generator is used "in manufacturing, processing, compounding, or producing for sale items of personal property in this state".

It appears from the clear wording of the opinion of the Court when read in conjunction with the sales tax law which defines electricity to be tangible personal property subject to the tax, that the intent of the Legislature would include equipment such as the turbine-generator and its accessory equipment.

Furthermore, subsequent to the decision of the First District Court of Appeal, the Department finds it unnecessary to address the matter of exemption of pollution control equipment under s. 212.051, because in its opinion, the First District Court of Appeal construed s. 212.08(5)(c), F.S.:

"to include such pollution control equipment as 'necessary in the production of steam or electrical energy', notwithstanding that a plant could theoretically produce electrical or steam energy without legally mandated pollution control equipment. No matter how theoretical the physics of producing steam or electrical energy in reality no equipment or machinery in Florida is going to produce electricity without the mandated pollution control equipment."

486 So.2d at 1355.

Therefore, based on the above analysis, the Department has reviewed the items set forth on Exhibit A for determining the status of these items under this revised declaratory statement. The results of this analysis are set forth in Exhibit B. To the extent that any statements or findings in the original declaratory statement are inconsistent, or different from those set forth in this amended declaratory statement, they are specifically found to be null and void.

DONE AND ENTERED this 27th day of January, 1987.

RANDY MILLER  
EXECUTIVE DIRECTOR  
DEPARTMENT OF REVENUE  
STATE OF FLORIDA

FILED WITH THE CLERK THIS 27TH DAY OF January, 1987.

EXHIBIT B

ITEMS AND SYSTEMS WHICH CONSIST OF  
MACHINERY AND EQUIPMENT  
EXEMPT FROM THE SALES TAX  
PURSUANT TO SECTION 212.08(5))c), F.S.

Tax Treatment of  
Specific  
Systems of Machinery  
No. Systems of Machinery and Equipment and Equipment

- |   |          |
|---|----------|
| 1. Subsurface Improvements Related to<br>Exempt Equipment | Prorated |
| 2. Waste Water Treatment - Above Grade                    | Exempt   |
| 3. Waste Water Treatment - Below Grade                    | Exempt   |
| 4. Permanent Railroad System                              | Taxable  |
| 5. Well Water Supply System                               | Exempt   |
| 6. Water Pretreatment System                              | Exempt   |

7. Sanitary Sewage System	Taxable
8. Yard Fire Protection System	Exempt
9. Service Water System	Exempt
10. Waste Water Treatment System	Exempt
11. Above Ground Racks/Below Ground Trenches	Prorated
12. Circulating Water Systems Structures	Exempt
13. Control Building	Taxable
14. Plant Water Service Equipment	Exempt
15. Fire Protection Equipment - Lube Oil Purification Area	Exempt
16. Coal Car Thawing Facility	N/A
17. ID & FD Fan Driver Control Building	Taxable
18. Fly Ash Blower Building	Taxable
19. Miscellaneous Coal Handling System	Prorated
20. Coal Unloading Facility	Exempt
21. Emergency Stackout System	Exempt
22. Reclaim System	Exempt
23. Crusher House and SWGR Room	Prorated
24. CH - Unloading Equipment	Exempt
25. Transfer House #1	Prorated
26. TH #1 - Unloading Equipment	Exempt
27. Transfer House #2	Prorated
28. TH #2 - Unloading Equipment	Exempt
29. Reclaim Hopper/Tunnel	Exempt
30. Conveyors & Trippers	Exempt
31. Emergency Conveyors	Exempt
32. Primary Power	Exempt
33. Coal Transporting Equipment (railroad cars are taxable but yard equipment is exempt)	Prorated
34. Silo Bay	Prorated
35. Silo Bay - Cranes and Hoists	Exempt
36. Coal Equipment Fuel Oil Storage Tank	Taxable
37. Ash Handling System	N/A
38. Furnace Bottom Ash System	Exempt
39. Instrumentation and Controls	Exempt
40. Pyrites Handling System	Exempt
41. Economizer Ash System	Exempt
42. Fly Ash System	Exempt
43. Miscellaneous Boiler Equipment	Taxable
44. Boiler Steel	Exempt
45. Boiler Miscellaneous Steel	Exempt

46. Steam Gen. Lifting Equipment	Exempt
47. Boiler Pressure Parts	Exempt
48. Settings and Casings	Exempt
49. Air Preheaters	Exempt
50. Forced Draft Equipment	Exempt
51. Pulverizer and Fuel Burning Equipment	Exempt
52. Sootblowers and Piping	Exempt
53. Boiler Ductwork	Exempt
54. Dust Collectors	N/A
55. Thermocouples	Exempt
56. Induced Draft Fans	Exempt
57. Light Oil Facilities	Exempt
58. Electrostatic Precipitator	Exempt
59. Induced Draft Equipment	Exempt
60. Flue Gas Desulfurization System	Exempt
61. Combustion Control Equipment	Exempt
62. Boiler Instruments - Miscellaneous	Exempt
63. Chemical Cleaning Piping	Exempt
64. Plant Instrumentation	Exempt
65. Feed Water and Condensation System	Exempt
66. Main Steam	Exempt
67. Hot Reheat	Exempt
68. Cold Reheat	Exempt
69. Extraction Steam	Exempt
70. Auxiliary Steam	Exempt
71. Condensate and Boiler Feed Piping	Exempt
72. Air Evacuation Piping	Exempt
73. Cooling Water System Piping	Exempt
74. Demineralized Water Transfer	Exempt
75. Seal Steam	Exempt
76. Desuperheater Spray	Exempt
77. Lube Oil	Exempt
78. Closed Cooling Water System	Exempt
79. Auxiliary Steam System - ASS	Exempt
80. Condensers and Auxiliaries 80A-E, 80B-T, 80C-E	Exempt
81. Circulating Water System	Exempt
82. Cooling Towers	Exempt
83. Auxiliary Power Transformers	Exempt
84. Start Up Transformers	Exempt
85. Battery Equipment	Exempt

86. Inverter	Exempt
87. Underground Conduit & Ducts	Exempt
88. Metallic Conduit	Exempt
89. Non-Metallic	Exempt
90. Cable Tray System	Exempt
91. Non-Segregated Cable Bus & Supports	Prorated
92. Power Cable	Prorated
93. Control and Instrument Cable	Exempt
94. Control Boards, Switchgear & Motor Control Centers	Exempt
95. Grounding for All Exempt Equipment	Exempt
96. Flue Gas Desulfurization System Electrical	Exempt
97. Turbine Generator	Exempt