

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

NICHOLAS COZZO, )  
d/b/a NICK'S DELI, )  
 )  
Petitioner, )  
 )  
vs. ) CASE NO. 88-1628  
 )  
STATE OF FLORIDA, )  
DEPARTMENT OF REVENUE AND )  
OFFICE OF THE COMPTROLLER, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

By Amended Petition for Formal Hearing dated May 2, 1988, Nicholas Cozzo, d/b/a Nick's Deli, Petitioner, seeks a refund of \$1392.53 paid under protest to the Department of Revenue, Respondent. Following motions for Recommended Summary Final Orders, the parties submitted a STIPULATION OF FACTS and requested the Hearing Officer submit a Recommended Order based upon the Stipulation and arguments included in motions submitted by the parties. All facts listed below are from the Stipulation. All exhibits noted in the Stipulation are forwarded herewith as exhibits.

Subsequent to the submission of this Stipulation, Petitioner has forwarded a copy of his check stated May 28, 1987 payable to the Department of Revenue in the amount of \$1392.53. (Exhibit K)

FINDINGS OF FACT

1. On October 14, 1985, Petitioner, Nicholas Cozzo, entered into a Stock Purchase Agreement for the sale of sixty (60) shares of the issued and outstanding capital stock of C & S Deli Sandwich and Fish, Inc., a Florida corporation, (the Company) to Robert A. Krueger and Joe Ellen Krueger (collectively, the Kruegers). As a result of the sale, Petitioner retained ownership of no further stock of the Company. (Exhibit A)

2. On October 14, 1985, the Kruegers executed two (2) promissory notes in the amounts of \$53,000.00 and \$5,000.00, respectively, to Petitioner and a Security Agreement securing payment of the notes. (Composite Exhibit B and Exhibit C)

3. On October 14, 1985, Petitioner tendered his resignation as Director, President and Treasurer of the Company. (Exhibit D)

4. Petitioner's security interest to the furniture, furnishings, fixtures, equipment and inventory of the Company (the "collateral") was duly perfected by the filing of a Uniform Commercial Code Financing Statement with the Uniform Commercial Code Bureau, Florida Department of State, on October 21, 1985. (Exhibit E)

5. A Uniform Commercial Code Financing Statement was recorded by the Petitioner in the Public Records of Pasco County, State of Florida, on October 15, 1985, in Official Records Book 1451, page 0493. (Exhibit F)

6. In early 1987, the Kruegers defaulted under the terms of the promissory notes.

7. Prior to April 24, 1987, Petitioner repossessed the furniture, furnishings, fixtures, equipment and inventory of the Company. No consideration was paid by Petitioner to the Company or the Kruegers upon his repossession of the foregoing described collateral. At no time did ownership of any of the capital stock of the Company revert back to Petitioner.

8. On May 5, 1987, Petitioner by private sale disposed of the collateral to Vincent Lopez and Glen Delavega. (Exhibits G, H, and I)

9. No surplus funds resulted from the sale of the repossessed collateral by Petitioner to Vincent Lopez and Glen Delavega.

10. At no time material hereto did the Florida Department of Revenue issue a tax warrant against the Company respecting any unpaid sales tax.

11. On or about May 6, 1987, Petitioner paid under protest to the Respondent Department of Revenue the delinquent unpaid sales tax of the Company in the amount of \$1392.53. The Department is still attempting to verify that amount at this date. The Petitioner maintains he paid the amount in order for the Department to issue a sales tax certificate and number to Vincent Lopez and Glen Delavega. The Department maintains its procedure at the time was to issue a sales tax number to the new owners and then proceed against them under Section 212.10, Florida Statutes.

12. It is the position of the Respondent that the Petitioner's repossession of the collateral constituted a sale within the purview of Section 212.10(1), Florida Statutes (1985), and Rule 12A-1.055, Florida Administrative Code, which places tax liability on the successor of a business whose previous owner has not satisfied outstanding sales tax obligations. Respondent further notes that the case Petitioner relies on, General Motors Acceptance Corporation v. Tom Norton Motor Corp., 366 So.2d 131 (Fla. 4th DCA 1979) was issued on January 10, 1979, while Section 679.105(5), Florida Statutes, which upholds tax laws when in conflict with security agreements, took effect January 1, 1980. Petitioner on the other hand claims that a lawful repossession of collateral under Florida's Uniform Commercial Code, Section 679.504, Florida Statutes (1985), does not constitute a "sale" of a business making him liable for the Company's unpaid sales tax. Petitioner continues to rely on GMAC, supra, and notes that it was cited by American Bank v. Con's Cycle Center, 466 So.2d 255 (Fla. 5th DCA 1985).

13. A refund application was submitted by Petitioner to the Department of Revenue on June 10, 1987. This application was denied by the Department of Revenue by letter dated January 28, 1988. (Exhibit J)

#### CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings.

15. Section 212.10(1), Florida Statutes, provides:

If any dealer liable for any tax, interest, or penalty levied hereunder shall sell out his business or stock of goods, he shall make a final return and payment within 15 days after the date of selling the business; his successor, successors, or assigns shall withhold a sufficient portion of the purchase money to safely cover the account of such taxes, interest, or penalties due and unpaid until such former owner shall produce a receipt from the Department showing that they have been paid or a certificate stating that no taxes, interest, or penalty are due. If the purchasers of a business or stock of goods shall fail to withhold a sufficient amount of the purchase money as above provided, he shall be personally liable for the payment of the taxes, interest, or penalties accruing and unpaid on account of the operation of the business by any former owner, owners, or assigns.

16. Rule 12A-1.055, Florida Administrative Code, generally tracks Section 212.10(1).

17. The issue here presented is whether a "sale" of the business occurred when Petitioner reacquired the assets of the business or whether no sale took place and the sole issue is priority of liens between the tax lien and secured chattel mortgage lien held by Petitioner on the assets of the business.

18. Respondent relies on *Jacobs v. Kirk*, 223 So.2d 795 (Fla. 4th DCA 1969) to support its position that a sale occurred when Petitioner repossessed the property. *Jacobs* involved the situation where the tenant owing sales taxes abandoned the demised premises leaving the entire stock of goods, and the landlord claimed title thereto pursuant to the terms of the lease. Further, in *Jacobs* the tax lien was filed subsequent to the landlord taking title to the goods left by the tenant. In holding this taking constituted a "sale", the court stated at p. 798:

In this case the transfer of the personal property to the landlord under the lease provision was just as effective a "sale" of the tenant's stock of goods as if the tenant had negotiated a sale of the stock of goods to a third person and thereafter paid the proceeds over to the landlord. We hold the transfer under the lease provision amounted to a sale of the tenant's stock of goods within the contemplation of FS, 1965, Section 212.10(1), FSA. Neither the tenant (as seller) nor the landlord (as purchaser) having complied with the requirement of that section, the landlord (as purchaser) became personally liable for the payment of the

taxes, interest and penalties which had accrued during the former owner's operation of its business.

19. Here the only assets of the Company, the stock of which Petitioner sold to Krueger, was the fixtures and equipment on which Petitioner held a Security Agreement as collateral for the promissory notes Krueger executed to consummate the purchase of the company. In Jacobs, supra, the tenant's assets on which the landlord had a lien for rent due was the stock owned by the tenant on the premises. If taking this stock by the landlord constituted a sale as Jacobs holds, the repossession of the equipment and fixtures by Petitioner also constitutes a sale.

20. Section 212.10(1), above quoted, requires the purchaser of a business or stock of goods to withhold a sufficient amount of the purchase money to pay sales taxes that have accrued to the business and be personally liable for such payment if he fails to do so. Here the second purchasers (Lopez and Delavega) purchased the company fixtures and equipment under warranty from Petitioner that the equipment was clear of all liens, including tax liens. These purchasers, pursuant to Section 212.10(1), could potentially have liability for the accrued sales tax and call upon Petitioner to comply with his warranty and satisfy this potential tax lien.

21. Petitioner contends that General Motors Acceptance Corporation v. Tom Norton Motor Company, 366 So.2d 131 (Fla. 4th DCA 1979) holds that a security interest perfected prior to the issuance of a tax lien taken priority over the tax lien. That court cited Jacobs v. Kirk, supra, for that very position leaving intact the holding in Jacobs that when all of the assets of the taxpayers are taken, a sale occurs and the tax burden follows the assets.

22. In view of the holding that a sale occurred, it is unnecessary to consider Respondent's position taken in its Amended Motion for Recommended Summary Judgment that Petitioner does not qualify for refund pursuant to Section 215.26.

23. From the foregoing, it is concluded that when Petitioner repossessed the assets of the company pursuant to the Security Agreement, a sale occurred and the sales tax owed followed the assets. It is

RECOMMENDED that a Final Order be entered denying Petitioner's claim for refund of \$1392.53 sales tax paid under protest.

ENTERED this 14th day of July, 1988, in Tallahassee, Florida.

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K. N. AYERS  
Hearing Officer  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 14th day of July, 1988.

COPIES FURNISHED:

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