

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

INTEGRA CORPORATION, )  
 )  
 Petitioner, )  
 )  
 vs. ) CASE NO. 90-4138  
 )  
 DEPARTMENT OF REVENUE, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER OF DISMISSAL

This matter was heard by telephone conference call on July 30, 1990, by William R. Dorsey, Jr., the Hearing Officer designated by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Robert D. Heyde, Esquire  
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For Respondent: Lealand L. McCharen, Esquire  
Assistant Attorney General  
Department of Legal Affairs  
The Capitol, Tax Section  
Tallahassee, Florida 32399-1050

STATEMENT OF THE ISSUE

The issue is whether the Petition filed by Integra Corporation challenging a tax assessment by the Florida Department of Revenue is time barred.

PRELIMINARY STATEMENT

Integra Corporation filed its Petition contesting an assessment of sales and use tax by the Department of Revenue with the Florida Division of Administrative Hearings on June 25, 1990. The Division of Administrative Hearings forwarded the Petition to the Department of Revenue that same day. After reviewing it, the Department of Revenue referred the matter to the Division of Administrative Hearings for formal proceedings on June 28, 1990. The Division received the material from the Department on July 2, 1990. On July 16, 1990, the Department of Revenue moved to dismiss the Petition for lack of jurisdiction. A motion to dismiss was heard by telephone conference call on Monday, July 30, 1990. Based upon the file, including the motion to dismiss, the reply to the motion to dismiss, the argument at the telephone conference

hearing and the replies of the parties to a written question posed by the Hearing Officer after the telephone conference, the following findings of fact and conclusions of law are made.

#### FINDINGS OF FACT

1. The Petitioner, Integra Corporation, had a dispute with the Florida Department of Revenue with respect to sales or use tax allegedly due in the amount of \$605,305.70 on lease payments made on its rental of hotels from their owners. An assessment for taxes due was processed in the normal manner by the Department of Revenue. Integra Corporation filed a Protest of the assessment, and after the Department's Notice of Decision denied the Protest, Integra filed a timely Petition for Reconsideration. Ultimately the Department issued a Notice of Reconsideration which rejected the arguments of Integra Corporation. Integra Corporation agrees that the Notice of Reconsideration was transmitted on April 24, 1990, for it alleges that fact in paragraph 3 of its Petition.

2. The Department's final rejection of the arguments made by Integra Corporation against the assessment of sales and use tax made in the Notice of Reconsideration dated April 24, 1990, prompted Integra Corporation to mail by certified mail, return receipt #P796 304 819, to the Division of Administrative Hearings on June 21, 1990, an original Petition challenging the Department's tax assessment. That petition was captioned Integra Corporation, Petitioner v. Department of Revenue, Respondent, and was filed by the Clerk of the Division of Administrative Hearings on June 25, 1990. No copy of the original Petition was served on the Department of Revenue, or its counsel. The opening paragraph states that Integra Corporation "hereby petitions the Department of Revenue for administrative proceedings. . ." The Clerk of the Division of Administrative Hearings realized that the Petition should not have been addressed to or filed with the Division of Administrative Hearings, and on that same day forwarded the Petition to the appropriate agency, the Department of Revenue, which received the Petition on June 27, 1990.

#### CONCLUSIONS OF LAW

3. The Department of Revenue has moved to dismiss the Petition on the authority of Section 72.011(2), Florida Statutes, which defines both the jurisdiction of circuit courts in specific tax matters, and the time for commencing administrative hearings and appeals in tax matters. According to Section 72.011(1):

A taxpayer may contest the legality of any assessment of tax, interest or penalty provided for under [a variety of chapters] by filing an action in circuit court; or, alternatively, the taxpayer may file a petition under the applicable provisions of chapter 120. However, once an action has been initiated under section 120.56, section 120.565, or section 120.57, no action relating to the same subject matter may be filed by the taxpayer in circuit court, and judicial review shall be exclusively limited to appellate review pursuant to section 120.68; and once an action has been initiated in circuit court, no action may be brought under chapter 120.

4. The time within which a taxpayer may contest the assessment of taxes, interest, or penalties in circuit court or in an administrative forum is limited to 60 days by Section 72.011(2), which states:

No action may be brought to contest an assessment of any tax, interest, or penalty assessed under a section or chapter specified in subsection (1) after 60 days from the date the assessment becomes final.

The statute goes on to make clear in Subsection (5) that "the requirements of this section are jurisdictional."

5. To determine when an assessment "becomes final" one must determine when the 60 days allowed in Section 72.011(2) begin to run. This is governed by the following portions of Rule 12-6.004, Florida Administrative Code:

(2) For purposes of Section 11, Chapter 81-178, Laws of Florida, an assessment becomes final as follows:

(c) If a petition for reconsideration is timely filed, the written denial or issuance of a reconsidered Notice of Decision shall constitute a final assessment as of the date of its issuance.

That rule also repeats the general statutory requirements that "a taxpayer has sixty (60) days from the date an assessment becomes final to file a Petition pursuant to Chapter 120, Florida Statutes, . . . or be barred from contesting the assessment." Rule 12-6.004(1), Florida Administrative Code.

6. Integra Corporation was required by statute and by rule to file its Petition contesting the final tax assessment made in the Department's April 24, 1990, Notice of Reconsideration within 60 days of April 24, 1990, i.e., by Monday, June 25, 1990.

7. The statutory manner in which a taxpayer may contest an assessment administratively is by filing "a petition under the applicable provisions of chapter 120," Section 72.011(1), Florida Statutes. The governing portion of the Administrative Procedure Act is Section 120.57(1)(b)3., Florida Statutes, which says:

Except for any proceeding conducted as prescribed in Section 120.575(1)(b) [which does not apply here because the tax at issue is not assessed for the sale or use of services], a petition or request for a hearing under this section shall be filed with the agency. If the agency elects to request a Hearing Officer from the division, it shall so notify the division within 15 days of receipt of the petition or request.

The grammar of Section 120.57(1)(b)3 points out the distinction between "the agency" and "the division." The agency is the department of government taking the action which aggrieves a citizen, the Department of Revenue in this case. See, Section 120.52(1), Florida Statutes. The "division" is "the Division of Administrative Hearings of the Department of Administration." Section 120.52(6), Florida Statutes.

8. The filing by Integra Corporation of its petition with the Division of Administrative Hearings on June 25, 1990, failed to meet the requirements of Section 72.011(1), Florida Statutes, because there is no "applicable provision" of Chapter 120 which authorizes or requires the filing of a Petition challenging a tax assessment with the Division of Administrative Hearings. The language used in the opening paragraph of the Petition filed in this case shows that Integra Corporation understood this. The petition was forwarded promptly to the Department of Revenue as noted in Finding 2 above. The Department of Revenue's Office of General Counsel which has been designated Agency Clerk by Rule 12-1.016, Florida Administrative Code, received the Petition of Integra Corporation on June 27, 1990. The address for the Agency Clerk is stated in that rule.

9. Integra Corporation responds to the Department's motion to dismiss by arguing that it is not necessary that Integra Corporation's Petition have been received by the Department of Revenue in order for the Petition to have been "filed" timely under Rule 12-6.004(1), Florida Administrative Code. Rather, the taxpayer need only have postmarked its petition within the time prescribed for filing.

10. The first problem with this argument is that the Petition was not addressed or mailed to the Agency Clerk of the Department of Revenue, but to the wrong agency, the Division of Administrative Hearings. See, Rule 12-1.016, Florida Administrative Code.

11. The second problem is that the argument fails to take account of the language of the applicable rule. The text of Rule 12-6.004 contains no definition of what constitutes filing with the Department of Revenue. Integra Corporation points instead to other rules in that same rule chapter, governing protests and appeals procedures, to support its argument that a Petition is filed when it is postmarked. For example, under Rule 12-6.003, which governs protests of corporate income tax assessments, a taxpayer may obtain review of such an assessment if the taxpayer "file[s] a written protest within 60 days . . . from the issuance of the proposed assessment or denial of claim for refund." Rule 12-6.003(2), Florida Administrative Code. Later subsections of the same rule provided that:

(5) Protests postmarked more than sixty (60) days . . . after issuance of the proposed assessment or denial of claim for refund will be deemed late filed . . . . A taxpayer may request an extension of the time for filing a protest by writing to the Bureau of Audit Selection . . . in sufficient time to permit the Department to receive and to act on the request prior to the expiration of the protest period.

If the protest is not sustained, under Rule 12-6.003(7):

A taxpayer shall have thirty (30) days from the issuance of a Notice of Decision to file a petition for reconsideration of the Notice of Decision. Petitions for reconsideration must be in writing, postmarked no later than the thirtieth (30th) day after the date of the Notice of Decision . . .

12. The review of tax assessments for taxes other than the corporate income tax are governed by Rule 12-6.0033, Florida Administrative Code, which provides in part:

(2) To secure review of an assessment issued pursuant to this section, a taxpayer must file a written protest with the Department.

(5) Protests postmarked more than twenty (20) days after the issuance of the assessment will be deemed late filed unless the taxpayer has secured a written extension of time from the Division of Collection and Enforcement within which to file a protest prior to said twentieth (20th) day.

13. The Department's rules governing the filing of protests directed to assessments of tax, and the filing of petitions for reconsideration of decisions rendered on taxpayer protests, do contain text which treats postmarking as the equivalent of filing, but none of those provisions allow papers to be sent by mail to the Division of Administrative Hearings.

14. The reason there is no provision in Rule 12-6.004, Florida Administrative Code, which treats postmarking as the filing of a Petition is not difficult to determine. After reconsideration is denied, and a notice of reconsideration issued, preliminary proceedings have ended. The taxpayer must choose a judicial or administrative forum under Section 72.011(1), Florida Statutes, and initiate a new proceeding. The Legislature was very careful to require that the taxpayer's choice be made and that the appropriate judicial or administrative proceeding be initiated within 60 days. Section 72.011(5), Florida Statutes. The Department of Revenue needs a clear way to determine whether the taxpayer has initiated a timely proceeding. Rule 12-6.004(1), Florida Administrative Code, indicates that the procedure applicable to initiation of the new proceeding in either forum statutorily available to the taxpayer is identical. Taxpayer actions in circuit courts are initiated by filing petitions or complaints with the Clerk of the Court. To a court, a matter is filed when it is received by a clerk of court. Rule 1.050, Florida Rules of Civil Procedure, states "every action of a civil nature shall be deemed commenced when the complaint or petition is filed . . ." It is rational for the Department to have treated the filing of a petition under Chapter 120 in the same way: A petition is filed when it is received by the Department of Revenue. The Department therefore did not include any language in Rule 12-6.004, Florida Administrative Code, which treats postmarking of a Petition as filing. 1/ In any case, the agency to which Integra Corporation postmarked the Petition was not the proper agency. The posting of the Petition is unavailing, for even if the act of mailing could make the Petition timely, that mailing would have to be addressed to the appropriate agency, which is not the case here.

15. The petition of Integra Corporation was not filed with the Department of Revenue within 60 days from the date the notice of reconsideration was issued, so the petition is untimely.

16. In other administrative proceedings, the failure to file a petition when due might be excused, but in tax matters such as this the Legislature was at pains to state that the requirements of Section 72.011, Florida Statutes, are jurisdictional. Consequently, the failure to have directed the petition to the proper agency bars Integra Corporation from further review of the Department's tax assessment in any administrative or judicial forum. Department of Revenue

v. Rudd, 545 So.2d 369 (Fla. 1st DCA 1989) (judicial forum); Mirabal v. Department of Revenue, 553 So.2d 1297 (Fla. 3d DCA 1989) (failure to file bond for tax assessed or waiver from executive director jurisdictional, circuit court action dismissed). This result is harsh, and if the statute and the Department's rules could reasonably be read to permit this Petition to go forward, that reading would be preferable and would be adopted. The laudable general preference for determining cases on the merits, and without resort to procedural rules which have the effect of nailing shut the courthouse door does not save Integra Corporation here. The Legislature's determination to make the filing requirement jurisdictional is a legislative determination to be strict, if not harsh, in such matters. See, Rudd and Mirabal, supra.

#### RECOMMENDATION

It is RECOMMENDED that the petition filed by Integra Corporation be dismissed as untimely.

DONE and ENTERED this 10th day of September, 1990, at Tallahassee, Florida.

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WILLIAM R. DORSEY, JR.  
Hearing Officer  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-1550  
(904) 488-9675

Filed with the Clerk of the  
Division of Administrative Hearings  
this 10th day of September, 1990.

#### ENDNOTE

1/ The appellate courts have rejected the argument that their jurisdiction is timely invoked if a notice of appeal is postmarked rather than filed within 30 days of rendition of the order to be reviewed. see, e.g., Bouchard v. State, Department of Business Regulation, 448 So.2d 1126 (Fla. 2d DCA 1984) (on motion to dismiss). In the absence of any rule which specifically permits postmarking to serve as filing, and in view of the similar jurisdictional nature of the act of filing the taxpayer's petition in circuit court or with the Department of Revenue to obtain further review, postmarking is insufficient to meet the statutory requirements for initiation of a proceeding to contest the assessment.

#### COPIES FURNISHED:

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