STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOHNSON SMITH-LIGHTER SIDE CO.,)
)
Petitioner,)
)
vs.) CASE No. 91-7583
)
STATE OF FLORIDA,)
DEPARTMENT OF REVENUE,)
)
Respondent.)
_________________________________)

RECOMMENDED ORDER

Pursuant to notice, William R. Cave, the assigned Hearing Officer, from the Division of Administrative Hearings, held a formal hearing in the above-styled case on April 9, 1992, in Bradenton, Florida.

APPEARANCES

For Petitioner: Mitchell I. Horowitz, Esquire
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For Respondent: C. Lynne Chapman, Esquire
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STATEMENT OF THE ISSUES

1. Whether charges made by Petitioner for "shipping, handling, packing and guaranteed safe delivery" were subject to sales tax during the audit period.

2. Whether penalty was properly assessed against Petitioner.

PRELIMINARY STATEMENT

Johnson Smith-Lighter Side Company (Johnson Smith) is in the mail order business, and during the audit period at issue operated out of a facility located in Bradenton, Florida. Johnson Smith used various types of carriers in order to cause the delivery of items sold to its customers. During the audit period in question, Johnson Smith did not charge sales tax on the items referred to in the order form as "Shipping, Handling, Packing and Guaranteed Safe Delivery."

The Department of Revenue (Department), in its audit of Johnson Smith's business for the period of July 1, 1985 through December 31, 1989 (audit period), determined that charge for the items "Shipping, Handling, Packing and Guaranteed Safe Delivery" should have been subject to sales tax, resulting in a sales tax assessment of $9,063.17. Also, the Department made other sales and use tax assessments against Johnson Smith totalling $33,466.85 to which Johnson Smith agreed and paid at the conclusion of the audit. Finally, the Department determined that Johnson Smith was liable for the penalty under Section 212.12(2), Florida Statutes, at maximum rate of twenty-five percent (25%), or a total of $11,859.02, on all issues raised in the audit, including those to which Johnson Smith agreed and paid at the conclusion of the audit. All of these matters were set out in the Department's Notice of Intent to Make Audit Changes dated July 12, 1990.

A Notice of Proposed Assessment was issued by the Department to Johnson Smith dated October 12, 1990, to which Johnson Smith filed a Protest dated December 12, 1990. The Protest contested only the issues on the item "Shipping, Handling, Packing and Guaranteed Safe Delivery" and delinquent penalty. By Notice of Decision dated September 30, 1991, Johnson Smith was notified that the Department had taken adverse action by denying all clams made in the Protest. A Petition for Administrative Hearing dated November 18, 1991 was filed with the Department on November 22, 1991.

By letter dated November 22, 1991 this matter was transferred to the Division of Administrative Hearings by the Department for the assignment of a Hearing Officer and to conduct a hearing. The matter was scheduled for hearing on April 9, 1992.

At the hearing, Johnson Smith presented the testimony of Ronald Hernden and Paul Hoenle. Johnson Smith's exhibits 1 through 5 were received as evidence in this case. The Department presented the testimony of Derrick Boston. Department's exhibits 1 through 3 were received as evidence in this case.

A transcript of this proceeding was filed with the Division of Administrative Hearings on April 29, 1992. At the conclusion of the hearing, the parties requested and were granted until May 20, 1992 to file their proposed findings of fact and conclusions of law with the understanding that any time constraint imposed in Rule 28-5.402, Florida Administrative Code, for the issuance of a Recommended Order was waived pursuant to Rule 22I-6.031(2), Florida Administrative Code. The parties timely filed their proposed findings of facts and conclusions of law under the extended time frame. A ruling on each proposed finding of fact submitted by the parties has been made and is reflected in an Appendix to the Recommended Order.

FINDINGS OF FACT

Based upon the stipulated facts, the testimony of the witnesses, and the documentary evidence received at the hearing, the following relevant findings of fact are made:

Stipulated Facts

1. Johnson Smith is a Florida corporation with corporate headquarters and a warehouse located in Manatee County, Florida. Johnson Smith is in the business of making mail order sales of small items of tangible personal property throughout the United States. Johnson Smith has no showroom and all its sales are mail order sales.

2. Johnson Smith has been in business for over 78 years and moved its base of operations from Michigan to Bradenton, Florida in July of 1986.

3. The Department of Revenue (Department) conducted a Sales and Use Tax Audit of Johnson Smith for the period June 1, 1985 through December 31,1989. As a result of this audit, Johnson Smith was assessed for delinquent sales and use tax, penalty and interest. [Joint Exhibit 1] The assessment was in the amount of $42,530.02 for tax, $11,859.00 for penalty and $11,192.46 for interest through October 10, 1990. Johnson Smith agreed that $33,466.85 of the tax plus interest on that amount was due and has paid all undisputed tax and interest. Johnson Smith disputed the remainder of the tax and interest and all of the assessed penalty.

4. Johnson Smith timely protested disputed amounts of tax, penalty and interest. The disputed amounts are:

TAX	PENALTY	INTEREST
$9,063.17	$11,859.02**	$3,589.04*

* computed through November 19, 1991 and accruing at $2.98 daily.

** this figure appears to be incorrect in that 25% of the total tax assessment of $42,4530.02 (Schedule A $13,099.66 and Schedule B $29,430.36) amounts to $10,632.51 rather than $11,859.02.

Johnson Smith timely filed a Petition for Administrative Hearing with the Department; accordingly, the Division of Administrative Hearings has jurisdiction over the case.

5. During the audit period, Johnson Smith periodically mailed catalogs to its customers. Each catalog contained an order form. All order forms used during the audit period were substantially similar. Joint Exhibit 2 is a sample order form. Joint Exhibit 3 is a sample catalog. During the audit, a copy of Joint Exhibit 2 was given to the Department's Auditor by an employee of the taxpayer when the Auditor asked for a copy of Johnson Smith's order form.

6. Each order form instructed the customer to pay a charge for "Shipping, Handling, Packing and Guaranteed Safe Delivery." During the audit period, no sales tax was collected or remitted on this charge by Johnson Smith. The Auditor assessed sales tax on this charge for sales to Johnson Smith's customers within Florida.

7. During the audit period, all orders were shipped to Johnson Smith's customers by United Parcel Service or the United States Postal Service. United Parcel Service was primarily used by Johnson Smith. Both United Parcel Service and the Postal Service charged for shipping by weight of the item and the zone of the United States where the package is being shipped.

8. Johnson Smith is not contesting the methodology or accuracy of the audit.

Additional Findings of Fact

9. The Department's auditor assessed sales tax on the charge for "shipping, handling, packing and guaranteed safe delivery" because the charges were not separately stated. The auditor did not consider whether the tangible personal property was shipped "FOB origin" or "FOB destination." In fact, even if the shipping charges had been separately stated, the auditor's testimony was that he would not have considered whether the goods were shipped "FOB origin" or "FOB destination," and would have charged sales tax on the shipping charges.

10. The Department reviewed the invoices for the sample months of October 1986, October 1987 and February 1988 to determine the ratio of Florida sales to sales everywhere. Using this sampling technique, the Department determined that approximately 4.06 percent of all sales made by Johnson Smith during the audit period were made in Florida, and taxable.

11. Using the year 1989 as a sample period, Johnson Smith reviewed invoices and determined the amount it received for the charge "shipping, handling, packing and safe delivery" from customers for all Florida sales to be $60,803.00. To determine the shipping charges attributable to Florida sales Johnson Smith multiplied 4.06 percent times all shipping charges paid to carriers by it during 1989. This amount was $71,248.00 or approximately $10,455.00 more than received from customers for shipping Florida sales. Additionally, it was the unrebutted testimony of Paul Hoenle that the cost of shipping Florida sales exceeded the amount collected from customers for Florida sales for the charge "shipping, handling, packing and safe delivery" set out on its order form. At all times material to this proceeding, Paul Hoenle was President and 100% stockholder of Johnson Smith, and was very familiar with all aspects of the operation of Johnson Smith.

12. There was competent, substantial evidence to establish facts to show that the cost of shipping Florida sales exceeded the amount received by Johnson Smith for the charge set forth in the order form as "Shipping, Handling, Packaging and Guaranteed Safe Delivery" for Florida sales.

13. The term "handling, packaging and guaranteed safe delivery" was a merchandising tool used by Johnson Smith to convince the customer that the were getting a "good deal" and to avoid complaints about high shipping costs.

14. Johnson Smith performed the services of handling, packing. However, the cost for these services were included in the price of the item being sold.

15. In a typical sale, Johnson Smith would receive an order from the customer, with either a check or a credit card number in payment for the item(s) purchased. The order would be entered, the item(s) pulled from inventory, placed in appropriate packaging, wrapped and addressed to the designated delivery address shown on the Johnson Smith order form. Once this was completed, the check was deposited or the credit card charge entered.

16. All arrangements with the carrier(s) to pick up the item(s) for delivery to the customer were made by Johnson Smith. All items for shipment to the customer were picked up at the Johnson Smith distribution facility in Bradenton, Florida. The customers did not make any of the arrangements with the carrier for delivery of the item(s) purchased by the customer. Johnson Smith selected the carrier to be used for delivery unless the customer indicated on the order form a preference for a particular carrier. The order forms introduced into evidence did not indicate that the customer had the option to

select the carrier. However, Paul Hoenle testified that some order forms did offer the customer this option, and when the customer noted a preference for a particular carrier then that carrier was used for delivery.

17. Usually where the item being shipped did not exceed a $100.00 in value the carrier furnished insurance on the item in its normal shipping charge. In those cases where the item being shipped exceeded $100.00 in value the carrier charged an additional amount above the regular shipping charge to insure the item. In those instances where the item shipped was lost or damaged by the carrier, Johnson Smith was reimbursed by the carrier and either replaced the item lost or damaged without cost to the customer or reimbursed the customer the price of the item.

18. There is competent, substantial evidence to establish facts to show that Johnson Smith was responsible for the item until it was delivered to the customer at the address furnished by the customer, and that title to the property did not pass to the customer until the item was delivered to the customer by the carrier at the address furnished by the customer.

19. Johnson Smith's structuring of its order form is consistent with order forms of other mail order sales firms in and outside of state of Florida in that the order forms of other mail order firms do not indicate that sales tax was charged on shipping, packing and handling charges. However, there was no evidence that the Department, in its audit of these other mail order sales firms, treated the charge for shipping, packing and handling for sales tax purposes any differently than it did in its audit of Johnson Smith.

20. Just prior to its move from Michigan to Florida, Johnson Smith hired Hernden to become its internal controller. Hernden had previously owned his own accounting practice in Michigan, and Johnson Smith was one of his accounting clients. Hernden is a Certified Public Accountant in both Michigan and Florida, and, at the time of the final hearing, was in charge of the tax department at the accounting firm of Christopher, Smith & Gentile in Bradenton, Florida, which is the Petitioner's current accounting firm.

21. Johnson Smith, which had no specific knowledge of Florida tax law, hired Hernden and charged him with the responsibility of learning Florida tax law and applying that information to Johnson Smith's business operations. Hernden had full access to all of the Petitioner's sales and purchase information.

22. While in Michigan, Johnson Smith maintained its books and records manually. Prior to moving to Florida, Johnson Smith studied various computer based systems designed specifically for a mail order business. After reviewing several available software programs, Johnson Smith hired a company based in Indiana to install a computer system for order entry and inventory control, as well as to determine the amount of sales to Florida residents for purpose of sales and use tax reporting.

23. The computer system was installed and operational at the time Johnson Smith commenced its business operations in Florida. However, a minor "glitch" in the program inadvertently caused, during the audit period, the misreporting of monthly sales in Florida, resulting in either too much or not enough sales tax reported to the Department.

24. Johnson Smith had no data on which to determine its historical sales to Florida. Thus, Johnson Smith was unable to ascertain that the computer

program and system installed by the computer specialists engaged by Johnson Smith had this "glitch," which caused the additional tax due shown on Schedule A-1 attached to the Notice of Intent to Make Audit Changes.

25. Johnson Smith engaged both a New York law firm, as well as a local law firm, to assist it in obtaining an income tax exempt industrial revenue bond to construct its distribution facility located in Bradenton, Florida. In addition, Johnson Smith also had engaged the accounting firm of Christopher, Smith & Gentile by the time Johnson Smith moved from Michigan to Florida in July 1986. None of these professionals ever advised Johnson Smith that sales tax was due on the lease payments made by Johnson Smith to its related landlord during the audit.

26. Hernden handled the acquisition of the computer equipment and accessories, and believed that Florida sales tax was included in the total sales price charged by the seller for such equipment. Hernden knew the Florida requirement that the charge for sales tax must be separately stated, but believed that the responsibility for charging, collecting, and remitting any sales tax due on the purchase of the computer equipment was that of the seller, and not that of Johnson Smith, and that the seller had in fact complied with this duty.

27. In the Internal work papers prepared by the Department's auditor, it was recommended that the delinquent penalty charge be reduced to ten percent (10%), which recommendation was agreed to by auditor's supervisor. Despite this recommendation, the full twenty-five percent (25%) penalty was assessed against Johnson Smith.

28. There is competent, substantial evidence to establish facts to show that Johnson Smith's noncompliance with its obligation to collect and remit the additional amounts of sales and use tax determined to be due by the Respondent as a result of the subject audit was due to reasonable cause, and not willful neglect or willful negligence.

CONCLUSIONS OF LAW

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

30. Section 212.02(16)(a), Florida Statutes, defines a sale to mean 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.

31. Section 212.06(1)(a), Florida Statutes, provides that sales tax is due upon the sales price of taxable goods at the moment of sale.

32. Section 212.02(17), Florida Statutes, in pertinent part, defines sales price as follows:

> "Sales price" means the total amount paid for tangible personal property, including any services that are a part of the sale, valued in money, whether paid in money or otherwise, and includes any amount for which credit is given to the purchaser by the seller, without

any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service cost, interest charged, losses, or any other expense whatsoever.

In the instant case, Johnson Smith has shown that the separately stated charge for "Shipping, Handling, Packaging and Guaranteed Safe Delivery" is in fact a charge for shipping and therefore, would not be considered as part of the sales price, and taxable, unless it can be shown that transfer of title to the goods occurred at the destination rather than at the time the carrier accepted the goods for delivery at Johnson Smith's distribution facility in Bradenton, Florida. Rule 12A-1.045 and Rule 12A-1.103, Florida Administrative Code. In the instant case, there is competent, substantial evidence to show that transfer of title to the goods occurred at the destination rather than at the time the carrier picked up the items at Johnson Smith's distribution facility in Bradenton, Florida. Therefore, the charge separately stated on the Order Form as "Shipping, Handling, Packaging and Guaranteed Safe Delivery" is subject to sales tax.

33. Section 212.12(2)(a), Florida Statutes, imposes a penalty upon a taxpayer who fails to timely pay sales or use tax when due. The imposition of the penalty is mandatory. However, the legislature has given the Department the authority and the discretion to compromise or settle the penalty when the Department determines that noncompliance is due to reasonable cause and not due to willful negligence, willful neglect, or fraud. Section 212.21(3), Florida Statutes. The Department promulgated and adopted Rule 12-13.007, Florida Administrative Code, which sets out the conditions upon which the penalty can be compromised or settled. The Petitioner has produced sufficient evidence of compliance with the above rule to justify a reduction in the amount of the penalty.

RECOMMENDATION

Based on the foregoing finding of fact and conclusions of law, it is, accordingly,

RECOMMENDED:

That the Department of Revenue enter a Final Order as follows:

(1) Upholding the assessment of sales tax and interest on the charge for shipping, handling, packing and guaranteed safe delivery, in the amount of $9,063.17 for the tax and $3,589.04 for interest accrued through November 19, 1991 plus interest accruing at the rate of $2.98 per day from, and including, November 20, 1991 until paid.

(2) Assessing a penalty of ten (10) percent on the total amount of taxes owed ($42,530.02) for a total penalty of $4,253.00.

DONE and ENTERED this 3rd day of August, 1992, in Tallahassee, Leon County, Florida.

WILLIAM R. CAVE
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
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(904)488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of August, 1992.

APPENDIX TO RECOMMENDED ORDER IN CASE NO. 91-7583

The following constitutes my specific rulings pursuant to Section 120.59(2), Florida Statutes, on the Proposed Findings of Fact submitted by the parties in this case.

Specific Rulings On Proposed Findings of Fact
Submitted by the Petitioner

1. The following proposed findings of fact are adopted in substance as modified in the Recommended Order. The number in parenthesis is the finding(s) of fact which so adopts the proposed finding(s) of fact: 1(1); 2(2); 6(7); 7(16); 8(17); 9(16); 10-11(15); 12(11,12); 13(13); 14(12,14); 15(19); 17(11,12); 18-19(9); 24-25(27); 26(28); 27(20); 28(21); 30(22); 31(23); 32(24); 35(25); 36-37(10); and 40(26).

2. Proposed findings of fact 3, 4, 5, 16, 29, 33, 34, 38, and 39 are either unnecessary or not relevant to the conclusion reached in the Recommended Order..

3. Proposed findings of fact 20 through 23 are conclusions of law rather than findings of fact.

Specific Rulings on Proposed Findings of Fact
Submitted by the Respondent

1. The following proposed findings of fact are adopted in substance as modified in the Recommended Order. The number in parenthesis is the finding(s) of fact which so adopts the proposed finding(s) of fact: 1 - 8;(1 - 8); 9(9 and 14); 13(6); 14(16 and 17); 15(13); 16(16); 17(15); 18(11); and 19(19).

2. Proposed finding of fact 10 is rejected as not being supported by competent, substantial evidence in the record.

3. Proposed findings of fact 11 and 12 are covered in the Preliminary Statement.

4. Proposed findings of fact 20 through 22 are not relevant as they go to the weight given to the testimony of the witnesses Hoenle and Hernden.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.