STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LAUREN INC.,

Petitioner,

vs. CASE NO. 92-3612

DEPARTMENT OF REVENUE,

Respondent.

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was conducted in this case on October 6, 1992, in Tallahassee, Florida, before Stuart M. Lerner, a duly designated Hearing Officer of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Marie A. Mattox, Esquire
William A. Friedlander, Esquire
3045 Tower Court
Tallahassee, Florida 32303

For Respondent: Eric J. Taylor, Esquire
Assistant Attorney General
Office of the Attorney General
The Capitol, PL01
Tallahassee, Florida 32399-1050

STATEMENT OF THE ISSUE

Whether the tax, penalty and interest assessment issued against Petitioner as a result of Audit No. 90-19801486 should be withdrawn as requested by Petitioner.

PRELIMINARY STATEMENT

By letter dated November 13, 1991, Respondent provided written notice of its decision, as a result of Audit No. 90-19801486, to issue an assessment against Petitioner in the amount of $238,780.06 for taxes owed (plus penalty and interest) for Petitioner's alleged use during the audit period of real property in connection with its coin-operated machine business. Petitioner sought reconsideration. On April 21, 1992, Respondent issued its Notice of Reconsideration sustaining the assessment. Petitioner subsequently filed with Respondent a Petition for Formal Hearing. On June 18, 1992, Respondent referred the matter to the Division of Administrative Hearings for the assignment of a Hearing Officer to conduct the formal hearing Petitioner had requested.

Two witnesses testified at the final hearing held in this case: Robert Mathews, Petitioner's chief executive officer during the audit period; and

Manley Lawson, a member of the Board of Directors of the Florida Amusement and Vending Association, a trade association representing the interests of those in the coin-operated machine business in this state. In addition to the testimony of these witnesses, a total of 11 exhibits were offered and received into evidence. The evidence presented was supplemented by a stipulation into which the parties had entered prior to hearing.

At the close of the evidentiary portion of the hearing on October 6, 1992, the Hearing Officer advised the parties on the record that post-hearing submittals had to be filed no later than 20 days following the Hearing Officer's receipt of the hearing transcript. The Hearing Officer received the hearing transcript on October 27, 1992.

On November 16, 1992, Respondent timely filed a proposed recommended order. The following day, Petitioner filed its proposed recommended order. It was accompanied by a motion requesting that the Hearing Officer extend by one day the deadline for submission of proposed recommended orders. Upon consideration, Petitioner's motion for extension of time is hereby GRANTED.

The parties' proposed recommended orders contain, what are labelled as, "findings of fact." These proposed "findings of fact" have been carefully considered and are specifically addressed in the Appendix to this Recommended Order

FINDINGS OF FACT

Based upon the evidence adduced at hearing, and the record as a whole, the following Findings of Fact are made:

1. Petitioner is a Florida corporation that was at all times material to the instant case (but is no longer) in the coin-operated machine business.

2. It owned various amusement and game machines that were placed at different locations pursuant to agreements with the location operators.

3. Most of these agreements were not reduced to writing.

4. In those instances where there was a written agreement, a "Location Lease Agreement" form was used, with insertions made where appropriate in the spaces provided. The form indicated, among other things, that Petitioner was "in the business of leasing, renting, servicing, maintaining and repairing of coin-operated machines" and that the agreement was "for the placement, servicing and maintaining of certain coin-operated machines" in the location specified in the agreement.

5. In the coin-operated machine trade, the custom was for the parties to an oral or written agreement for the placement of an amusement or game machine on the property of another to treat such an agreement as involving the location operator's rental of the machine owner's tangible personal property rather than the machine owner's rental of the location operator's real property.

6. Petitioner and the location operators with whom it contracted followed this custom of the trade in their dealings with one another. They construed their agreements as involving the rental of Petitioner's tangible personal property by the location operators and acted accordingly. Petitioner collected from the location operators the sales tax due on such rentals and remitted the

monies collected to Respondent. 1/ It engaged in this practice for approximately a decade without challenge by Respondent.

7. In late 1990 and early 1991, Respondent conducted an audit of Petitioner's records. The audit covered the period from January 1, 1988, to September 30, 1990 (referred to herein as the "audit period").

8. Among the records reviewed were those agreements between Petitioner and location operators that were reduced to writing.

9. Based upon their reading of these agreements, the auditors were of the view that the agreements into which Petitioner had entered were actually for the rental of the location operators' real property, not the rental of Petitioner's machines. They therefore concluded that Petitioner, as opposed to the location operators, should have paid sales tax and that Petitioner's purchase of machines and parts should not have been treated as tax exempt.

10. The assessment which is the subject of this proceeding thereafter issued.

CONCLUSIONS OF LAW

11. The instant case is governed by the version of Rule 12A-1.044, Florida Administrative Code, that was in effect during the audit period (referred to herein as the "Rule"). It read in pertinent part as follows:

> (2) Vending and amusement machines, machine parts, and locations.
> (a) When coin-operated vending and amusement machines or devices dispensing tangible personal property are placed on location by the owner of the machines under a written agreement, the terms of the agreement will govern whether the agreement is a lease or license to use tangible personal property or whether it is a lease or license to use real property.
> (b) If machines are placed on location by the owner under an agreement which is a lease or license to use tangible personal property, and the agreement provides that the machine owner receives a percentage of the proceeds and the location operator receives a percentage, the percentage the machine owner receives is rental income and is taxable. The tax is to be collected by the machine owner from the location operator. The purchase of the records, needles, tapes, cassettes, and similar items, machines, machine parts and repairs, and replacements thereof by the machine owner is exempt.
> (c) If machines are placed on location by the owner under an agreement which is a lease or license to use real property, and the agreement provides that the machine owner receives a percentage of the proceeds and the location operator receives a percentage, the

percentage the location operator receives is income from the lease or license to use real property and is taxable. The tax is to be collected by the location operator from the machine owner. The purchase of the records, needles, tapes, cassettes, and similar items, machines, machine parts, and repairs and replacements thereof by the machine owner is taxable.

* * *

(4) The purchase of amusement machines or merchandise vending machines and devices is taxable, unless purchased for exclusive rental.

* * *

(7) The following examples are intended to provide further clarification of the provisions of this section:

(a) Example: The owner of Town Tavern enters into a lease agreement with Funtime Company. Under the terms of the agreement, Funtime will provide coin-operated video game machines to Town Tavern, with Funtime retaining title to the machines and providing repairs or replacement parts as necessary. As consideration for the rental of the machines, Town Tavern will give Funtime 60% of the proceeds from the machine. By the terms of the agreement, this arrangement is a lease of tangible personal property and Funtime, as the lessor, must collect tax from Town Tavern on the portion of the proceeds it receives. The purchase of the video game machines, machine parts, and repairs thereof by Funtime Company is exempt. The portion of the proceeds retained by Town Tavern is not taxable.

(b) Example: An amusement and vending machine owner enters into a license agreement with City Airport, which grants the machine owner the right to place amusement and vending machines in Concourse A. The amusement machines consist of several electronic games and a pinball machine. The vending machines consist of soft drink, snack food, and candy machines. City Airport has the right to designate the areas within the concourse where the machines will be located; the machine owner and owner's employees are to stock the machines and provide repairs as needed. As consideration under the agreement, City Airport will receive 15 percent of all proceeds from the machines. By the terms of the agreement, this arrangement is a license to use real property, and City Airport, as the licensor, must collect tax from the machine owner.

12. At issue in the instant case is whether the agreements Petitioner entered into with location operators during the audit period were, as claimed by Petitioner, leases or licenses to use tangible personal property, within the meaning of subsection (2)(b) of the Rule, or whether they were, as asserted by Respondent, leases or licenses to use real property, within the meaning of subsection (2)(c) of the Rule.

13. After having carefully examined the record in the instant case, particularly the stipulations and evidence regarding the contents of the agreements in question, how the agreements were interpreted by Petitioner and the other parties to the ageements, and the trade customs prevailing at the time, the Hearing Officer finds that the agreements were leases or licenses to use tangible personal property, within the meaning of subsection (2)(b) of the Rule, and that therefore the assessment issued against Petitioner, which was predicated upon a contrary finding, is not valid. See Blackhawk Heating & Plumbing Co., Inc., v. Data Lease Financial Corp., 302 So.2d 404, 407 (Fla. 1974)("[i]n the construction of written contracts, it is the duty of the court, as near as may be, to place itself in the situation of the parties, and from a consideration of the surrounding circumstances, the occasion, and apparent object of the parties, to determine the meaning and intent of the language employed;" "[w]here the terms of a written agreement are in any respect doubtful or uncertain, or if the contract contains no provisions on a given point, or if it fails to define with certainty the duties of the parties with respect to a particular matter or in a given emergency, and the parties to it have, by their own conduct, placed a construction upon it which is reasonable, such construction will be adopted by the court, upon the principle that it is the duty of the court to give effect to the intention of the parties where it is not wholly at variance with the correct legal interpretation of the terms of the contract"); Oakwood Hills Company v. Horacio Toledo, Inc., 599 So.2d 1374, 1376 (Fla. 3d DCA 1992)("[i]t is a recognized principle of law that the parties' own interpretation of their contract will be followed unless it is contrary to law;" "the court may consider the conduct of the parties through their course of dealings to determine the meaning of a written agreement"); International Bulk Shipping, Inc. v. Manatee County Port Authority, 472 So.2d 1321, 1323 (Fla. 2d DCA 1985)("[w]hile we agree that the language of Item 220 [of the tariff] does not clearly cover the shifting charges at issue, we observe that a court may consider trade customs and prior dealings between the parties to give meaning to the provision"); Bay Management, Inc., v. Beau Monde, Inc., 366 So.2d 788, 793 (Fla. 2d DCA 1978)("where a contract fails to define with certainty the duties of the parties, and the parties by their conduct have placed a reasonable construction on it, . . . such construction should be adopted by the court").

14. Accordingly, the assessment should be withdrawn.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby

RECOMMENDED that the Department of Revenue enter a final order withdrawing the assessment that is the subject of the instant proceeding.

DONE AND ENTERED in Tallahassee, Leon County, Florida, this 23rd day of November, 1992.

STUART M. LERNER
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 23rd day of November, 1992.

ENDNOTE

1/ Respondent concedes that, assuming these agreements involved the rental of tangible personal property by the location operators rather than the rental of real property by Petitioner, the "correct" amount of sales tax was collected and remitted by Petitioner. It also concedes that such amount "is no different than the total amount that [Petitioner] would have paid its location o[perato]rs in sales tax" had these agreements been treated, as Respondent contends they should have been, as rentals of real property by Petitioner.

APPENDIX TO RECOMMENDED ORDER
IN CASE NO. 92-3612

The following are the Hearing Officer's specific rulings on, what are labelled as, "findings of facts" in the parties' proposed recommended orders:

Petitioner's Proposed "Findings of Fact"

II.a.- Accepted and incorporated in substance, although not necessarily repeated verbatim, in this Recommended Order.
II.b.- Rejected as unnecessary to the extent that it references Petitioner's reliance on the December 6, 1971, letter from the Florida Revenue Commission. Otherwise, it has been accepted and incorporated in substance.
II.c.- First sentence- Rejected as unnecessary; Second sentence: Rejected as more in the nature of a summary of testimony than a finding of fact based upon such testimony; Third sentence: Accepted and incorporated in substance.
II.d.- Rejected as not supported by persuasive competent substantial evidence. Petitioner was made aware of the audit results in March of 1991.
II.e. through II.f.- Accepted and incorporated in substance.
II.g.- Accepted and incorporated in substance to the extent that it states that "Petitioner was renting [out its] personal property." Rejected as unnecessary to the extent that it states that the "auditor conducting the audit for the Respondent failed to thoroughly review all of the

information in the Petitioner's possession."

II.h.- Rejected as unnecessary.

II.i.- First and fourth sentences: Rejected as unnecessary; Second and third sentences: Rejected as more in the nature of statements of law than findings of fact inasmuch as they purport to describe the provisions of an agency rule.

II.j.- Accepted and incorporated in substance.

II.k.- Rejected as more in the nature of argument than a finding of fact.

Respondent's Proposed "Findings of Fact"

1-5. Accepted and incorporated in substance.

6. Rejected as more in the nature of a statement of law than a finding of fact to the extent that it states that "Rule 12A-1.044(2)(b), F.A.C. . . . covers rentals of tangible personal property." Otherwise, it has been accepted and incorporated in substance.

7. Rejected as more in the nature of a statement of law than a finding of fact inasmuch as it purports to describe the provisions of an agency rule.

8. Accepted and incorporated in substance to the extent that it states that Petitioner collected sales tax from location operators and remitted the amount collected to Respondent. Rejected as more in the nature of a conclusion of law than a finding of fact to the extent that it describes the amount collected and remitted as "correct."

9. Rejected as more in the nature of a statement of law than a finding of fact inasmuch as it purports to describe the provisions of an agency rule.

10-13. Accepted and incorporated in substance.

14. Rejected as more in the nature of a statement of law than a finding of fact inasmuch as it purports to describe the provisions of an agency rule.

15. Accepted and incorporated in substance.

16. Rejected as more in the nature of a conclusion of law than a finding of fact.

17. Rejected as more in the nature of a statement of law than a finding of fact inasmuch as it purports to describe the provisions of an agency rule.

18-19. Accepted and incorporated in substance.

COPIES FURNISHED:

Marie A. Mattox, Esquire
William A. Friedlander, Esquire
3045 Tower Court
Tallahassee, Florida 32303

Eric J. Taylor, Esquire
Assistant Attorney General
Office of the Attorney General
The Capitol, PL01
Tax Section
Tallahassee, Florida 32399-1050

Dr. James Zingale, Executive Director
Department of Revenue
104 Carlton Building
Tallahassee, Florida 32399-0100

Linda Lettera, Esquire
General Counsel
Department of Revenue
204 Carlton Building
Tallahassee, Florida 32399-0100

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 OF TIME 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.