STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GATOR COIN MACHINE COMPANY, INC.,	)	
Petitioner,	)	
vs.	)	CASE NO. 92-4806
DEPARTMENT OF REVENUE,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, the above matter was heard before the Division of Administrative Hearings by its duly designated Hearing Officer, Donald R. Alexander, on November 4 and 5, 1992, in Tallahassee, Florida.

APPEARANCES

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

For Respondent: Eric J. Taylor, Esquire
Department of Legal Affairs
The Capitol-Tax Section
Tallahassee, Florida 32399-1050

STATEMENT OF THE ISSUES

The issues are whether petitioner must pay the sales taxes, interest, and penalties proposed in respondent's notice of reconsideration dated June 12, 1992, and whether petitioner is entitled to a refund for alleged overpayments of the sales tax during the audit period.

PRELIMINARY STATEMENT

This matter began after an audit was conducted by respondent, Department of Revenue (DOR), to verify the payment of sales taxes by petitioner, Gator Coin Machine Company, Inc., during the period June 1, 1985, through April 30, 1989. Based upon its conclusion that the taxpayer had insufficient documentation to support the claim that all taxes due had been paid, DOR ultimately proposed that the taxpayer be assessed $57,945.10. Thereafter, petitioner filed its petition for formal hearing challenging the proposed assessment in its entirety and also requesting a refund of $11,015 for allegedly overpaying sales taxes during the audit period.

The matter was referred by respondent to the Division of Administrative Hearings on August 6, 1992, with a request that a hearing officer be assigned to

conduct a formal hearing. By notice of hearing dated August 31, 1992, a final hearing was scheduled on October 19, 1992, in Tallahassee, Florida. At the parties' joint request, the matter was rescheduled to November 4 and 5, 1992, at the same location.

At final hearing, petitioner presented the testimony of James Vern Williams, a certified public accountant (CPA) and accepted as an expert, Larry J. Rosenquist, accepted as an expert, and Taylor E. Overby, III, a CPA and accepted as an expert. Also, it offered petitioner's exhibits 1-8, 10, and 13-15. All exhibits were received in evidence. Respondent presented the testimony of Victoria L. Crean, a DOR Auditor IV, and offered respondent's exhibits 1-5. All exhibits were received in evidence.

At hearing, respondent moved to dismiss petitioner's claim for a refund on the ground the request was untimely and was barred by a statute of non-claim. A ruling on this motion was reserved and this issue is dealt with in the conclusions of law.

The transcript of hearing (two volumes) was filed on November 24, 1992. Proposed findings of fact and conclusions of law were originally due on December 14, 1992. At the request of the parties, this time was extended to January 29, 1993, and then again to February 15, 1993, and proposed orders were timely filed on that date. In addition, a notice of filing supplemental authority was filed by petitioner on February 24, 1993. A ruling on each proposed finding has been made in the Appendix attached to this Recommended Order.

FINDINGS OF FACT

Based upon all of the evidence, the following findings of fact are determined.

A. Background

1. Petitioner, Gator Coin Machine Company, Inc. (petitioner or Gator), is a Florida corporation engaged in the vending machine business throughout the northern part of the State extending from Leon County eastward to Duval County. Gator places coin-operated cigarette vending machines in various business locations, such as lounges, package stores, motels and restaurants. In return for allowing the machines to be placed on the premises, the location owner receives a fee for each pack of cigarettes sold from the machine. This fee is paid to the location owner and is considered a commission or rent for allowing Gator to "lease" the real property on which the machines are placed. All such commissions are subject to the sales tax, which rate may vary depending on the sales tax rate in a particular county. The sales tax is included with the commission (rent) paid to the location owner, and the location owner then has the obligation of remitting the tax to the state. However, the burden of showing that the tax has been paid to the location owner rests upon the vending machine owner.

2. Respondent, Department of Revenue (DOR), is the state agency charged with the responsibility of enforcing the Florida Revenue Act of 1949, as amended. Among other things, DOR performs audits on taxpayers to insure that all taxes due have been correctly paid. To this end, in 1990 a routine audit was performed on Gator covering the audit period from June 1, 1985, through April 30, 1989.

3. After the results of the audit were obtained and an initial assessment made, on January 22, 1991, DOR issued a revised notice of intent to make sales and use tax audit changes wherein it proposed to assess Gator $35,561.67 in unpaid sales taxes, $8,887.82 in delinquent penalties, and $12,934.34 in accrued interest on the unpaid taxes through the date of the revised notice, or a total of $57,383.83. The unpaid taxes related to taxes allegedly due on commissions paid to location owners during the audit period and were assessed against Gator on the grounds the taxpayer had not separately stated the tax on its evidence of sale and failed to provide internal documentation to verify that the taxes had actually been paid. On April 19, 1991, a third revision of the proposed assessment was issued which decreased slightly the unpaid taxes and corresponding penalties but increased the size of the assessment to $57,945.10 due to the continuing accrual of interest. On July 1, 1991, Gator was offered the opportunity to informally contest the assessment. A letter of protest was filed on July 29, 1991, wherein Gator generally contended that (a) its records conformed with the industry practice and that an adequate audit trail existed to substantiate the payment of taxes, and (b) the responsibility for payment of the taxes ultimately rested with the location owner rather than Gator. On February 10, 1992, DOR issued its notice of decision rejecting Gator's position but offering to reduce the penalty on the unpaid sales taxes to 5%. At the same time, and although Gator had not challenged the auditor's method of computing the amount of sales tax, DOR upheld the auditor's determination on that point. After a petition for reconsideration was filed by Gator on March 10, 1992, in which Gator raised for the first time a claim that it was due a refund of $11,015 for overpayment of taxes on cigarette sales during the audit period, DOR issued its notice of reconsideration on June 12, 1992, denying the petition and offering Gator a point of entry on these issues. Such a request was timely filed and this proceeding ensued.

B. The Tax

4. The tax for which petitioner has been assessed became effective on July 1, 1986, and is found in Section 212.031, Florida Statutes. On an undisclosed date, DOR mailed each vending machine company in the state a flier which summarized the new changes in the tax law. The flier noted that the sales tax would be levied on each "license to use or occupy property" and specifically included "an agreement by the owner of real property granting one permission to install and maintain full-service coin-operated vending machines on the premises." Because the vending machine owner is considered to have been granted a license to use the real property of the location owner, the fee (rent) paid by the vending machine owner to the location owner was thus subject to the new sales tax. The notice further provided that the tax "must be collected by the person granting the privilege to use or occupy any real property from the person paying the license fee and is due and payable at the time of receipt." This flier constituted the only notice by DOR concerning the imposition of the new tax. There was no notice to the vending machine owners that they must separately state the sales tax from the commission when paying the commission to the location owner. This was because the flier's main purpose was to put the taxpayers on notice that they were subject to the new tax.

5. Sometime after the tax became effective, DOR developed a rule to implement the new law. Specifically, it amended Rule 12A-1.044, Florida Adminstrative Code, to provide guidance to taxpayers in the coin-operated industry as to who had the taxpaying and collecting responsibility. However, the rule simply stated that the owner of the vending machine was responsible for paying the tax on the rental fee paid to the location owner and did not state how this payment was to be documented or recorded by the lessee.

6. In the absence of any guidance from DOR, the Florida Amusement Association, of which Gator is a member, held meetings around the state to inform the members of their responsibilities under the new law. One method thought to be acceptable to establish payment of the sales tax was to keep internal documentation as to commission rate and tax paid to the various locations. As will be discussed hereinafter, Gator and other vending machine owners began following this practice.

7. On May 11, 1992, or three years after the audit period had ended, and almost six years after the imposition of the tax, DOR adopted an amendment to rule 12A-1.044(10) to provide that "the tax must be separately stated from the amount of the lease or license payment." This constituted the first notice to vending machine owners that they were required to state separately on the check remitted to their locations each month the commission plus tax. It should also be noted that DOR has never specified the exact type of documentation required by this rule or the format in which the information should be submitted.

C. The Industry Practice

8. Petitioner is one of many coin-operated vending machine companies doing business in the state of Florida. The evidence shows that of some twenty representative companies doing business in the state, including Gator, all operate in the same manner. Generally, the vending machine owner has a low investment in equipment which is easily relocated from one place of business to another. Because it is not unusual for the businesses in which equipment is placed to frequently change ownership, and often times the location owner can shop around and obtain a better commission from another vending machine company, it is fairly common to have machines placed in a location for as few as six or seven months. Therefore, it is a common practice in the industry to do business on a handshake and without a formal written agreement. In other words, the agreement to allow the machines to be placed on the premises and the amount of commission (rent) to be paid for leasing that space is based largely on a handshake between the two owners. This accounts in part for the lack of documentation such as a charge ticket, sales slip or invoice between the two owners concerning the amount of sales tax associated with the rent since such documents or evidence of sale are not practicable. The lack of documentation is also attributable to the fact that until May 1992 DOR never advised the vending machine companies that some type of "evidence of sale" was needed.

9. In determining the commission rate to be paid to the various locations, the vending machine owner must first ascertain what the market will bear in terms of selling a pack of cigarettes in the machine. After calculating his overhead, the vending machine owner then bargains with the location owner as to how much of the remaining difference between the cost of cigarettes and overhead and the selling price should be paid to the location owner. This amount of money agreed upon by the vending machine and location owners, and expressed in a per pack rate, is commonly known as the commission expense and includes the total sum of rent plus sales tax. For example, if the total commission is twenty cents per pack of cigarettes sold from each machine, the rent would be approximately 18.2 cents while the sales tax would make up the remainder of that amount. All vending machine owners, including Gator, made it explicitly clear to the location owner that the commission check was tax inclusive.

10. During the audit period, it was standard industry practice for the vending machine owner to write a tax inclusive check to the location owner each month. In other words, a check for the amount due the location owner, including

rent and tax, is paid to the location owner each month without any notation on the check as to what portion represents the rent and what portion represents the tax. In the case of Gator, its checks carried only the stamped notation "CIG-COM", which represented the words "cigarette commissions." The record shows that except for one small company with relatively few clients, all representative vending machine companies operated in this manner.

D. Gator's Recordkeeping

11. Like other vending machine companies, Gator's records consisted only of hand-written records on index cards. Indeed, Gator kept no computerized records at the time of the audit. More specifically, all calcuations as to taxes owed, the price of cigarettes, tax calculated on cigarettes vended through any given machine, and any additional information pertaining to the individual machines were kept on 8 x 10 white and pink index cards. These cards were commonly referred to as location cards and were updated each time the machine was moved from one location to another and when the price of cigarettes was changed. At the time of the audit, more than 99% of the original white and pink cards from the sample time period requested by the auditor were available for her inspection.

12. The only documentation existing between the location and vending machine owners was the machine or route ticket, which is no different than merchandising tickets showing the number of units sold. This document reflected the amount of packs sold and the amount of money received from each machine but did not contain a separation of commission plus tax. This information was used by Gator to determine the number of packs sold from each machine during the month. The number of packs was then multiplied by the "rate" for that machine to ascertain the commission due the location owner. Although route tickets were contemporaneously prepared by a route (service) man, they were discarded before the audit began. This is probably because in a prior audit conducted in 1983 or 1984 DOR auditors expressed no interest in reviewing the route tickets. In any event, the route tickets are not essential to a resolution of the issues.

13. A pink card was generated by Gator for each machine placed in a lessor's place of business. The card contained information, all written in pencil and amended as necessary, regarding inventory, location of machine, selling price of cigarettes, the negotiated commission rate to be paid to the location owner, and the tax computed on the license fee. The latter item was recorded in the top right hand side of the index card and, when coupled with the independent accounting firm's representation as to the integrity of the accounting system, provides reliable evidence that the commission paid to the location owner was tax inclusive. For example, petitioner's exhibit 2 received in evidence, which contains representative pink cards, reveals that on November 7, 1986, machine number 175 was installed at "River Walk Cruises #1" in Jacksonville and the location owner was thereafter paid a per pack commission of fourteen cents, of which 13.15 cents represented the rent while the remainder represented the sales tax. It is noted again that more than 99% of these cards from the sample period audited were available for inspection.

14. A white card was also prepared for each machine and listed the number of packs sold, the per pack rate, and the amount paid to the location owner. However, it did not contain a breakdown between commission expense and the related tax. In addition, Gator maintained what was known as a monthly report, which was a summation and accumulation of sales information derived from the white cards. The report listed the rate and number of packs sold for each machine. Like the white card, the monthly report did not contain a breakdown

between the rent and sales tax. Finally, journals and ledgers were prepared containing summaries of information taken from the machine cards.

15. Expert testimony by two certified public accountants (CPAs) and a longtime industry representative established that petitioner's records (general accounting records, route tickets, location cards and ledgers) were in conformity with good accounting practice and the industry norm. If anything, Gator's records were more comprehensive than most other vending machine companies and satisfied the requirements of applicable rules and statutes. More specifically, by maintaining location cards which show the sales price per pack of cigarettes with a breakdown between the tax and rent, Gator's records were consistent with good accounting practices and the type of recordkeeping maintained by the industry. It was further established that the industry practice is to conduct business on a "tax inclusive" basis, that is, to issue checks without separately stating what portion of the amount is taxes. In addition, cancelled checks, bank statements, journals and ledgers were available to verify commissions paid to various locations. DOR did not challenge the accuracy of this supporting documentation and agreed, for example, that the month-end commission summaries tied into petitioner's journals and checks. Both financial experts concluded, and the undersigned so finds, that the records establish that the taxes were paid.

16. During final hearing, and for the first time during the administrative hearing process, DOR challenged both the testimony of the experts and the reliability of petitioner's records on the ground the CPAs who testified were not present when the checks were written and thus had no personal knowledge that the checks were tax inclusive. However, the CPAs established the integrity of petitioner's recordkeeping and accounting system and the fact that the system used by Gator produces accurate information that can be relied upon by third party users. This was not credibly contradicted. It can be reasonably inferred from these facts that the hand-written notations on the pink cards concerning the sales tax computed on the license fee were accurate and that the corresponding checks paid to the location owners were tax inclusive. DOR also suggested that the penciled entries on the pink cards pertaining to the tax may have been prepared solely for purposes of this litigation and were not contemporaneous. For the reason stated above, this assertion is also rejected. It should be noted further that except for the allegations themselves, DOR did not challenge the authenticity of the records nor produce any evidence of circumstances that would show the records lacked trustworthiness.

17. DOR further contended that because there was no written contract or other tangible evidence of sale between the two owners where the tax was separately stated, there was insufficient evidence to support petitioner's claim that the taxes were paid. Put another way, DOR contended that Gator needed not only internal documents (such as location cards) to verify the payment of taxes, it also needed documents submitted to the location owner reflecting the separation of tax and commission. However, prior to the 1992 amendment to rule 12A-1.044(10), there was no formal or informal requirement to do so nor had DOR given notice of such a need, and since the internal documentation confirms the payment of the taxes, no other evidence is required. Finally, the evidence shows that a vending machine company has never been considered a "dealer" within the meaning of Subsection 212.07(2), Florida Statutes, as asserted by DOR, and thus the requirement in that subsection that a dealer separately state the amount of tax on the evidence of sale is not applicable. Indeed, this interpretation of the statute is consistent with the language in Rule 12A-1.086, Florida Administrative Code, which characterizes the lessor (location owner) rather than the lessee as the dealer.

E. Refund Issue

18. Gator contends that using an error rate of two or three percent, a recomputation of its taxes paid during the audit period reveals that it is owed a refund of $11,015 occasioned by its bookkeeper incorrectly computing the tax due on the gross sales price of cigarettes rather than on the net price. Since the alleged overpayment of taxes occurred during the period from June 1, 1985, through April 30, 1989, the last alleged overpayment of taxes would have occurred shortly after April 30, 1989.

19. Prior to March 10, 1992, when Gator filed its petition for reconsideration with DOR, Gator had not filed a request for a refund on DOR Form 26 (DR-26), which is the form on which refunds must be requested. In its petition for reconsideration, Gator noted that "a Petition for Refund will be filed in the immediate future if this has not previously been accomplished." As of the date of hearing, which was more than three years after the last alleged overpayment of taxes was made, no DR-26 had been filed. Therefore, the request for refund is deemed to be untimely.

CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction of the subject matter and the parties hereto pursuant to Sections 120.57(1) and 120.575, Florida Statutes.

21. As provided for in Subsection 120.575(2), Florida Statutes (Supp. 1992), the agency's "burden of proof... shall be limited to a showing that an assessment has been made against the taxpayer and the factual and legal grounds upon which the (agency) has made the assessment". Once that showing is made, the burden shifts to the taxpayer to demonstrate by a preponderance of the evidence that the assessment is incorrect.

22. Initially, it is necessary to resolve respondent's contention that the requested refund is barred by Section 215.26, Florida Statutes, which is a statute of non-claim for funds paid into the state treasury by error. Subsection (2) thereof provides in relevant part:

> (2) Applications for refunds as provided by this section shall be filed with the Comptroller, except as otherwise provided herein, within 3 years after the right to such refund shall have accrued else such right shall be barred. (Emphasis added)

The refund sought herein is based on taxes paid on cigarette sales during the audit period ending April 30, 1989. Thus, the time for filing an application for refund expired on or about April 30, 1992, or three years after the right to a refund last accrued. Since "applications for refunds . . . shall be filed with the Comptroller," and no such application was timely filed with that office, the claim for a refund must be denied. This is especially true since the statute of non-claim cannot be waived, State ex rel. Victor Chemical Works v. Gay, 74 So.2d 560 (Fla. 1954), and absent a timely filing, no refund is available. Devlin v. Dickinson, 305 So.2d 848 (Fla. 1st DCA 1978). In so ruling, the undersigned has considered petitioner's contention that under Subsection 95.091(4), Florida Statutes, the initiation of this action tolls the running of that time period. However, that subsection applies to the tolling of

the statute of limitations for an action to collect taxes, which is not relevant here, and in any event has no application to a statute of non-claim.

23. Before addressing the merits of the principal issue, a brief discussion is necessary concerning DOR's contention that one of the CPAs (witness Overby) was incompetent to testify that the taxes were paid since he was not present when the checks were written and thus had no personal knowledge as to that fact. But Overby's testimony on this matter is admissible under two evidential theories. First, this "ultimate fact" was in the form of an opinion based on Overby's discussions with his client and a complete review of the accounting records. As such, it was admissible under Section 90.702, Florida Statutes. Second, based upon the established fact that the accounting system was reliable and produced accurate information, it can be reasonably inferred from Overby's testimony that the pink cards were accurate and thus the checks were tax inclusive. Thus, the testimony of a bookkeeper or clerk was unnecessary. Moreover, the undersigned notes that except for the allegation itself, DOR did not challenge the authenticity of the records nor the accuracy of the supporting documentation, and it failed to present any circumstances that showed their lack of trustworthiness. Therefore, the motion to strike Overby's testimony on this subject is denied.

24. Several statutes govern this controversy. First, a license is defined in Subsection 212.02(10)(i), Florida Statutes, as follows:

> (i) "License," as used in this chapter with reference to the use of real property, means the granting of a privilege to use or occupy a building or a parcel of real property for any purpose.

Having been granted a license, Gator was subject to payment of a sales tax on its license fee (rent) under the terms of Subsection 212.031(2)(a), Florida Statutes. Moreover, subsection (3) of the same statute provides that "the tax imposed by this section shall be in addition to the total amount of the rental or license fee." Further, if a taxpayer "cannot prove that the tax levied by this chapter has been paid to his . . . lessor, . . . (he or she) is directly liable to the state for any tax, interest, or penalty due on such taxable transactions." Subsection 212.07(9), F. S. Finally, there are requirements in Subsection 212.07(2), Florida Statutes, that "a dealer shall, as far as practicable, add the amount of the tax imposed under this chapter to the sales price" and that "the amount of the tax . . . be separately stated as Florida tax on any charge ticket, sales slip, invoice, or other tangible evidence of sale". However, this provision is not controlling here since a vending machine owner has never been considered a "dealer" within the meaning of the law, and in any event, the evidence shows that the described "tangible evidence of sale" was not practicable in this type of industry. This conclusion is supported by the facts that (a) Rule 12A-1.086, Florida Administrative Code, refers to the lessor or location owner as the dealer, and (b) until May 1992, when current rule 12A-1.044(10) was adopted, no notice was given by DOR that such rent and tax had to be separately stated on the evidence of sale (check).

25. By a preponderance of the credible and persuasive evidence, petitioner has "prove(n) that the tax levied by (chapter 212) has been paid to his . . . lessor." Therefore, it is concluded that petitioner should not be liable for the assessment proposed in DOR's notice of reconsideration dated June 12, 1992.

26. Finally, in its proposed order petitioner has presented argument and case citations for the proposition that the lessor (location owner) is responsible for payment of the tax and, as a prerequisite to issuing an assessment, DOR must first seek payment of the taxes from the location owner. However, these cases merely support the principle that the lessor (or location owner) has the burden of collecting and remitting the tax to the state while the burden of paying the tax falls on the lessee. The holding in these cases in no way relieves petitioner of its burden. Therefore, DOR is not obliged to seek payment from the lessor before issuing its assessment.

RECOMMENDATION

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

RECOMMENDED that respondent enter a final order granting the petition of Gator Coin Machine Company, Inc. and rescinding (withdrawing) the assessment set forth in the notice of reconsideration dated June 12, 1992, but denying petitioner's request for a refund of $11,015 for sales taxes allegedly overpaid during the audit period.

DONE AND ENTERED this 19th day of March, 1993, in Tallahassee, Leon County, Florida.

DONALD R. ALEXANDER
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 19th day of March, 1993.

APPENDIX TO RECOMMENDED ORDER, CASE NO. 92-4806

Petitioner:

1-2. Partially accepted in finding of fact 2.
3-6. Partially accepted in finding of fact 3.
7. Partially accepted in finding of fact 1.
8-9. Rejected as being unnecessary.
10. Partially accepted in finding of fact 17.
11. Partially accepted in finding of fact 15.
12-14. Rejected to the extent they are inconsistent with findings of fact 17 and 18.
15-17. Partially accepted in finding of fact 8.
18-20. Rejected as being irrelevant.
21-22. Rejected as being unnecessary.
23-24. Partially accepted in finding of fact 11.
25. Rejected as being unnecessary.
26. Partially accepted in findings of fact 13 and 14.
27. Partially accepted in finding of fact 14.

28-29. Partially accepted in finding of fact 17.
30-33. Partially accepted in finding of fact 4.
34-35. Partially accepted in finding of fact 5.
36. Partially accepted in finding of fact 15.
37. Rejected as being unnecessary.
38-39. Partially accepted in finding of fact 15.
40-41. Partially accepted in finding of fact 8.
42. Partially accepted in findings of fact 10 and 15.
43-45. Partially accepted in finding of fact 9.
46-49. Partially accepted in finding of fact 6.
50-51. Partially accepted in finding of fact 7.
52. Rejected as being unnecessary.
53-54. Partially accepted in finding of fact 10.
55-56. Partially accepted in finding of fact 7.
57. Partially accepted in finding of fact 15.
58. Rejected as being a conclusion of law.
59. Rejected as being a conclusion of law.
60. Partially accepted in finding of fact 15.
61-63. Rejected to the extent they are inconsistent with findings of fact 17 and 18.
64-65. Partially accepted in finding of fact 12.
66-68. Partially accepted in finding of fact 14.
69. Partially accepted in finding of fact 7.
70-75. Rejected as being unnecessary.
76. Partially accepted in finding of fact 12.
77. Rejected to the extent it is inconsistent with findings of fact 17 and 18.
78. Partially accepted in finding of fact 15.
79-81. Partially accepted in finding of fact 16.
82. Partially accepted in findings of fact 13 and 14.
83-84. Partially accepted in finding of fact 12.
85. Rejected to the extent it is inconsistent with findings of fact 17 and 18.
86. Partially accepted in finding of fact 16.
87-88. Rejected to the extent they are inconsistent with findings of fact 17 and 18.
89. Partially accepted in finding of fact 16.
90. Partially accepted in finding of fact 17.
91. Partially accepted in finding of fact 16.
92. Rejected as being irrelevant since the collection of taxes from Jax Liquors occurred after the audit period.
93-95. Rejected as being unnecessary.

Respondent:

1-2. Partially accepted in finding of fact 1.
3-4. Partially accepted in finding of fact 9.
5. Partially accepted in finding of fact 13.
6-8. Partially accepted in finding of fact 12.
9. Partially accepted in finding of fact 10.
10. Rejected as being unnecessary.
11a. Partially accepted in finding of fact 12.
11b. Partially accepted in findings of fact 10, 13 and 15.
11c. Partially accepted in finding of fact 14.
11d. Partially accepted in finding of fact 14.
12-15. Partially accepted in finding of fact 10.

Note - Where a proposed finding has been partially accepted, the remainder has been rejected as being unnecessary, subordinate, irrelevant, not supported by the more credible and persuasive evidence, or a conclusion of law.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

ALL PARTIES HAVE THE RIGHT TO SUBMIT TO THE DEPARTMENT OF REVENUE WRITTEN EXCEPTIONS TO THIS RECOMMENDED ORDER. ALL AGENCIES ALLOW EACH PARTY AT LEAST TEN DAYS IN WHICH TO SUBMIT WRITTEN EXCEPTIONS. SOME AGENCIES ALLOW A LARGER PERIOD WITHIN WHICH TO SUBMIT WRITTEN EXCEPTIONS. YOU SHOULD CONSULT WITH THE DEPARTMENT OF REVENUE CONCERNING ITS RULES ON THE DEADLINE FOR FILING EXCEPTIONS TO THIS RECOMMENDED ORDER.

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AGENCY FINAL ORDER

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STATE OF FLORIDA
DEPARTMENT OF REVENUE

GATOR COIN MACHINE CO., INC.,

Petitioner,

vs. DOAH CASE NUMBER 92-4806
DOR 93-14-FOF

DEPARTMENT OF REVENUE,

Respondent.
_____/

FINAL ORDER

This cause came on before the Department of Revenue for the purpose of considering a Recommended Order and the issuing of a Final Order. The Hearing Officer assigned by the Division of Administrative Hearings submitted a Recommended Order to the Department of Revenue dated March 19, 1993. A copy of the Recommended Order is attached hereto. Also entered in this case were Petitioner's Recommended Order, Respondent's Proposed Recommended Order, Respondent's Exceptions to the Recommended Order, and Respondent's Proposed Substituted Order.

The Hearing Officer in his Recommended Order recommended that the Department enter a Final Order granting the Petition of Gator Coin Machine Company Inc. and rescinding (or withdrawing) the assessment of sales tax on certain real property rental payments made by petitioner to location owners at which sites Petitioner had placed cigarette vending machines. The Hearing Officer recommended the denial of Petitioner's claim for a refund connected with the payment of taxes on sales made through the vending machines.

The Department, after a thorough review of the entire record in this case, rejects that portion of the Hearing Officer's Recommended Order (herein Recommended Order) which recommends the rescission (or withdrawal) of the assessment. The Department adopts and incorporates by reference in this Final Order that portion of the Recommended Order in which the claim for refund is denied.

FINDINGS OF FACT

1. The Department adopts and incorporates in this Final Order all of Finding of Fact 1 in the Recommended Order except the portion of the 6th sentence which reads "The sales tax is included with the commission (rent) paid to the location owner...." The Department rejects this finding. The issue in this case was whether Gator Coin paid sales tax to its location owners. No one who was employed by or associated with Gator Coin during the audit period testified that the sales tax was part of the "commission" during the audit period. Tr. p. 115, all lines, 116, lines 1 through 12; p. 207, lines 9

through25; p. 208, lines 1 through 15. None of the documents admitted into evidence by Gator Coin in support of its assertions has any mention of the words "sales tax" contained on them. Consequently, this portion of Finding of Fact 1 is not supported by competent, substantial evidence.

2. The Department adopts and incorporates into this Final Order all of the Finding of Fact 2, 3, 4, and 5 of the Recommended Order.

3. The Department modifies Finding of Fact 6 in the Recommended Order. The Hearing Officer's finding does not state whether the Florida Amusement Association discussed the Association's chosen reporting method with the Department or had the method approved by the Department. There was no evidence produced that the Department approved of this method. Consequently, the Finding of Fact 6 is modified to the extent described above.

4. The Department adopts and incorporates in this Final Order, Finding of Fact 7, and 8.

5. The Department rejects Finding of Fact 9 of the Recommended Order. The Hearing Officer accepts as a fact that the "commission" rate created by Gator Coin included the sales tax. There was no testimony that this "commission" rate was a method permitted by the State. There was no testimony, by anyone who had any relationship with Gator Coin during the audit period, what Gator Coin told its location owners during the audit period. Tr. p. 116, lines 13 through 21; p. 117, lines 12 through 19. Consequently, Finding of Fact 9 of the Recommended Order is not supported by competent, substantial evidence.

6. The Department modifies Finding of Fact 10 of the Recommended Order. No one testified, who had personal knowledge of the method of payment of sales tax to location owners by Gator Coin during the audit period, as to what Gator Coin included in its checks to its location owners. Tr. 32, lines 2 through 13, p. 73, lines 8 through 25; p.74, lines 1 through 17; p. 116, lines 13 through 21, p. 117, lines 12 through 19, p. 121, lines 1 through 12; p. 131, lines 16 through 25; p. 150, lines 10 through 25; p. 151, lines 1 through 24. The checks had merely the stamped words "cig. comm." Tr. p. 32, lines 2 through 13. The checks did not have on them the words "including sales taxes." Tr. 230, lines 10 through 25; pps. 231, 232, all lines; p. 233, lines 1 through 9. Consequently, Finding of Fact 10 is modified to the extent described above.

7. The Department adopts and incorporates by reference in this Final Order Finding of Fact 11 and 12 of the Recommended Order.

8. The Department rejects Finding of Fact 13 of the Recommended Order. No one who testified at the hearing could state when the obvious pencil marks were made; whether the marks were on the pink card during the audit period, or whether any of the numbers on the card were in fact representative of any sales taxes paid to the location owners during the audit period. Tr. p.205, lines 15 through 25; p. 206, p. 207, lines 1 through 17. Consequently, Finding of Fact 13 of the Recommended Order is not supported by competent, substantial evidence.

9. The Department adopts and incorporates in this Final Order, Finding of Fact 14 of the Recommended Order.

10. The Department rejects Finding of Fact 15 of the Recommended Order. First, none of the experts who testified had personal knowledge of the method used by Gator Coin during the accounting period in the payment of sales tax.

Second, while the Department did not challenge the documents for what was on the face of them, or the accuracy of what they purported to state, the Department did contest that the documents proved that sales tax was paid to the location owners. Tr. p. 107, lines 19 through 25; p. 108 through 122 all lines; p. 123, lines 1 through 17; p. 141, lines 10 through 15;. Consequently, Finding of Fact 15 is not supported by competent, substantial evidence.

11. The Department rejects Finding of Fact 16. The Department challenged all the written documents from the audit period on. Tr. p. 204, lines 20 through 25; p.. 205 through 223, all lines; p. 232 lines 19 through 25; p. 233, all; p. 238, lines 1 through 9; Gator Coin's "pink cards" did not show that sales tax was paid to the location owners. Tr. p. 233, lines 15 through 25; p. 234, all lines, 235, lines 1 through 14. Since these pencilled-in records did not show that sales tax was paid, they were, to that extent, factually immaterial. No one who had personal knowledge of these records during the audit period testified as to the pencil marks and when such marks were placed on the "pink" cards. Tr. p. 207, lines 15 through 25. Consequently, Finding Fact 16 is not supported by competent, substantial evidence. The Department rejects Finding of Fact 17. It is immaterial that the documents are internal or external. The documents failed to show that the taxes were paid. Consequently, Finding of Fact 17 of the Recommended Order is not supported by competent, substantial evidence.

12. The Department adopts and incorporates into this Final Order, Finding of Fact 18, and 19 of the Recommended Order.

CONCLUSIONS OF LAW

13. The Department adopts and incorporates by reference in this Final Order, Conclusions of Law 20, 21, and 22 as they appear in the Recommended Order.

14. The Department rejects Conclusion of Law 23 of the Recommended Order. The Department asserts that since no one with personal knowledge of the events during the audit period testified for Gator Coin, Gator Coin failed to meet its burden that it prove it paid the sales taxes to its location owners, nor was there documentary evidence introduced that explicitly demonstrated that sales tax was paid. Pages 5, 6, 7, 8, and 9 of the Respondent's Exceptions to the Recommended Order, which text is hereby adopted and incorporated by reference into this Final Order, provides with particularity the specific legal authority upon which this rejection is based. A copy of the Respondent's Exceptions to the Recommended Order is attached hereto.

15. The Department rejects Conclusion of Law 24 of the Recommended Order. The Hearing Officer cited s. 212.02(10)(i), F.S., as defining a license, and found that Petitioner had been granted a license to use real property, and as a licensee, was subject to payment of sales taxes on the rental payments made pursuant to such license, as provided in s. 212.031(2)(a), Florida Statutes. Further, the Hearing Officer cited subsection (3) of s. 212.031, F.S., as providing that the tax be in addition to the total amount of any rental or license fee. Also, the Hearing Officer quoted from s. 212.07(9), F.S., which provides that a taxpayer is directly liable to the state for any tax, interest or penalty if the taxpayer cannot prove that the tax levied by Chapter 212, F.S., was paid to the lessor of the property. However, notwithstanding these statutory provisions, the Hearing Officer then concluded that the requirements in s. 212.07(2), F.S., which mandates that a dealer must add the tax to the sales price and that the amount of the tax be separately stated, was not

controlling. By so holding, the Hearing Officer swept away the clearly applicable law cited above. In support of his finding, the Hearing Officer stated that the machine owner was not considered a "dealer" and that in the vending machine business the tangible evidence of a sale was not practicable. The Hearing Officer then stated that his conclusion is supported by the language of Rule 12A-1.086, F.A.C., which refers to the lessor or location owner as the "dealer', and by the fact that "until May 1992, when current rule 12A-1.044(10) was adopted, no notice was given by DOR that such rent and tax had to be separately stated on the evidence of sale (check)."

16. The Department rejects this Conclusion of Law because the renting of property gives rise to the payment of a sales tax upon the total of the monthly payment from the tenant to the landlord as described in s. 212.031(1)(c), Florida Statutes. Thus, as between the tenant and landlord, the tenant is the legislatively designated party to pay the tax to the landlord as such duty is described in s. 212.031(2)(a), Florida Statutes. Further, as provided in s. 212.07(9), F.S., if a renter cannot prove that it paid the tax to the lessor, the renter is directly liable to the state for any "tax, interest or penalty due on such taxable transactions." The renter in this case is Gator Coin and, as previously stated herein, it failed to prove by competent, substantial evidence that it paid the tax to the landlords, which were the location owners.

17. The Department rejects Conclusion of Law 25 of the Recommended Order. The Hearing Officer found that "[b]y a preponderance of the credible and persuasive evidence, petitioner has `prove(n) that the tax levied by (chapter 212) has been paid to his...lessor"'. He concluded "that petitioner should not be liable for the assessment proposed in DOR's notice of reconsideration dated June 12, 1992." The Department rejects this finding as having no basis in law because, as expressed in the Department's rejection of Conclusion of Law 23 and of 24, no one with personal knowledge of the events during the audit period testified for Gator Coin, nor was any documentary evidence provided that explicitly proved that the tax was paid. Tr. p. 230, lines 3 through 21. Gator Coin did not meet its burden of proving that the sales taxes were paid to its location owners as required by statute. Therefore, Gator Coin, as a renter, was liable for the tax, interest and penalty.

RULINGS ON RESPONDENT'S EXCEPTIONS TO THE RECOMMENDED ORDER

18. Further, the Department accepts, to the extent modified herein, all the exceptions to the Finding of Fact, and to the Conclusions of Law as expressed in the Respondent's Exceptions to the Recommended Order.

CONCLUSIONS OF LAW

After a thorough review of the entire record in this matter, it is ORDERED:

19. That the assessment against Gator Coin Machine Company Inc., set forth in the Notice of Reconsideration dated June 12, 1992, is sustained: That the conclusion expressed in the Recommended Order that such assessment be rescinded, is rejected: but that the denial as expressed in the Recommended Order of Gator Coin's request for a refund in the amount of $11,015 for sales taxes allegedly overpaid during the audit period, is adopted.

20. Any party to this Final Order has the right to seek judicial review of the Final Order as provided in Section 120.68, Florida Statutes, by the filing of a Notice of Appeal as provided in Rule 9.110, Florida Rules of Appellate Procedure, with the Clerk of the Department in the Office of General Counsel,

Post Office Box 6668, Tallahassee, Florida 32314-6668 and by filing a copy of the Notice of Appeal, accompanied by the applicable filing fees, with the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this Final Order is filed with the Clerk of the Department.

DONE AND ENTERED in Tallahassee, Leon County, Florida this 25th day of June, 1993.

STATE OF FLORIDA
DEPARTMENT OF REVENUE

_____
L. H. FUCHS
EXECUTIVE DIRECTOR

CERTIFICATE OF FILING

I HEREBY CERTIFY that the foregoing FINAL ORDER has been filed in the official records of the Department of Revenue this 25th day of June, 1993.

COPIES FURNISHED:

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attachments:

Hearing Officer's Recommended Order
Respondent's Exceptions To The Proposed Order

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DISTRICT COURT OPINION

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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

GATOR COIN MACHINE CO., INC.,

Appellant,

vs.

DEPARTMENT OF REVENUE,

Appellee.
_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO. 93-2207
DOAH CASE NO. 92-4806

Opinion filed September 22, 1994.

An appeal from Department of Revenue. L. H. Fuchs, Judge.

Marie A. Mattox of Marie A. Mattox, P.A., Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, and Eric J. Taylor, Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

The appellant challenges an administrative order by which the Department of Revenue (the department) sustained a tax assessment. In this order the department rejected several critical findings from a recommended order in which a hearing officer determined that the assessment should be rescinded because the appellant had already paid the necessary tax. We conclude that the hearing officer's findings were based on competent substantial evidence, and that the department exceeded its authority under section 120.57(1)(b)10, Florida Statutes, in rejecting these findings. The challenged order is therefore set aside.

ALLEN, KAHN and MICKLE, JJ., CONCUR.