STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LAUREN INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 93-0256F
	)	
DEPARTMENT OF REVENUE,	)	
	)	
Respondent.	)	
_____	)	

FINAL ORDER

Pursuant to notice, a formal hearing was conducted in this case on August 30, 1993, 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
3045 Tower Court
Tallahassee, Florida 32303

Michael Coniglio, Esquire
104 East Third Avenue
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 ISSUES

Whether Petitioner is entitled to an award of attorney's fees and costs pursuant to Section 57.105, 57.111, or 120.575, Florida Statutes, for those fees and costs Petitioner reasonably incurred as a result of its participation in the administrative proceeding (DOAH Case No. 92-3612) in which it challenged the decision of the Department of Revenue (hereinafter referred to as the "Department" or "Respondent") to issue an assessment against it for taxes owed, plus penalty and interest, for its alleged use, during the audit period, of real property in connection with its coin-operated machine business?

PRELIMINARY STATEMENT

On January 19, 1993, following the entry of a final order by the Department adopting the Hearing Officer's recommendation in DOAH Case No. 92-3612 that it withdraw the assessment it had issued against Petitioner, Petitioner filed a petition with the Division of Administrative Hearings requesting that it be awarded attorney's fees and costs "pursuant to Section 57.105, Section 57.111,

and Chapter 120, F.S." for fees and costs it incurred in successfully challenging the assessment. On March 1, 1993, the Hearing Officer issued an order dismissing the petition because it did not comply with all of the requirements of Rule 60Q-2.035, Florida Administrative Code. The dismissal was "without prejudice to Petitioner filing an amended petition [meeting] the requirements of Rule 60Q-2.035, Florida Administrative Code, within 30 days of the date of this order."

Petitioner filed an amended petition on March 29, 1993. The Department requested, and was granted, an extension of time to file its response to the amended petition. The Department's response was filed on May 3, 1993. In its response, the Department contended that, contrary to the position taken by Petitioner in the amended petition, the "assessment of sales taxes [against Petitioner] for the use of real property had a basis in law and fact at the time of the assessment" and that there were "special circumstances" that would make the award sought by Petitioner "unjust." It further observed, in a footnote, that it was "doubtful" that Section 57.105, Florida Statutes, one of the statutory provisions upon which Petitioner was relying, authorized Hearing Officers to make fee and cost awards inasmuch as the statute "speaks in terms of 'court.'"

Following his review of the Department's response to the amended petition, the Hearing Officer determined that it was necessary for him to conduct an evidentiary hearing in order to resolve the dispute that existed between the parties with respect to the issues of "substantial justification" and "special circumstances." Such a hearing was ultimately held, as noted above, on August 30, 1993. At the outset of the hearing the parties entered into various stipulations. The Department did not present any evidence to supplement these stipulations. Petitioner presented the testimony of Marie A. Mattox, Esquire, its counsel of record in this and the underlying proceeding. It also offered 21 exhibits (Petitioner's Exhibits 1 through 13 and 15 through 22) into evidence. All 21 exhibits offered by Petitioner were received by the Hearing Officer. In addition, the Hearing Officer indicated that, at the request of the parties, he would take official recognition of all pertinent statutory and rule provisions, as well as the Recommended Order and Final Order issued in the underlying administrative proceeding.

At the close of the evidentiary portion of the hearing on August 30, 1993, the Hearing Officer advised the parties on the record that post-hearing submittals had to be filed no later than 30 days following the Hearing Officer's receipt of the hearing transcript. The Hearing Officer received the hearing transcript on September 10, 1993. On September 30, 1993, the Department filed an unopposed motion requesting an extension of the deadline for filing post-hearing submittals. The motion was granted and the deadline was extended to Friday, November 12, 1993. The Department filed its proposed final order on November 12, 1993. That same day, Petitioner filed a motion requesting a further extension of the filing deadline for post-hearing submittals. The motion's certificate of service reflects that a copy of the motion was served by United States Mail on counsel for the Department on November 12, 1993. To date, no response to the motion has been filed. Upon consideration, the motion is hereby GRANTED and Petitioner's post-hearing submittal, which was filed on Monday, November 15, 1993, will be treated as having been timely filed.

The parties' post-hearing submittals each 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 Final Order.

FINDINGS OF FACT

Based upon the evidence adduced at hearing, the stipulations of the parties, matters officially recognized 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 (hereinafter referred to as the "industry 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 a routine audit (Audit No. 90-19801486) 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. The Department's auditors are, for the most part, college-trained accountants.

9. While they receive Department-sponsored training in the general procedures and standards they are expected to adhere to in conducting their audits, they are not provided with training and information regarding the trade customs and practices that are unique to particular industries or businesses they audit.

10. The Department auditors who conducted the audit of Petitioner's records reviewed, among other things, those agreements between Petitioner and location operators that were reduced to writing.

11. Based upon their reading of these agreements, the auditors erroneously, yet not unreasonably given the imprecise contractual language used, believed 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, in light of then existing provisions of Rule 12A-1.044, Florida Administrative Code (hereinafter referred to as the "Rule"), 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.

12. In March of 1991, the Department sent Petitioner a Notice of Intent to Make Sales and Use Tax Audit Changes for the audit period based upon the auditors' findings.

13. The Notice advised Petitioner of its right to meet with the Department and discuss these findings made by the auditors.

14. Petitioner requested such a meeting.

15. The meeting was held on May 7, 1991, in Tallahassee.

16. Petitioner's attorney, Marie A. Mattox, Esquire, represented Petitioner at the meeting. Mattox was accompanied by Robert Matthews, one of Petitioner's officers.

17. The Department was represented by the head of the its Bureau of Hearings and Appeals and several other employees.

18. Mattox and the Department representatives discussed the contents of the written agreements the auditors had reviewed. During the discussion, Mattox reminded the Department representatives of the "industry custom." 2/ In addition, she brought to their attention that the agreements under review involved amusement and game, not vending, machines.

19. The meeting lasted only approximately ten minutes.

20. Mattox and Matthews left the meeting with the impression, based upon the comments made by the Department representatives, that the matter would be resolved in Petitioner's favor.

21. To their surprise, on May 23, 1991, the Department issued a Notice of Proposed Assessment in which it announced its intention, based upon 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.

22. The Notice of Proposed Assessment contained a statement advising Petitioner of its right to protest the Department's proposed action.

23. Mattox, on behalf of Petitioner, responded to the Notice of Proposed Assessment by sending a letter, dated July 22, 1991, to the Department's General Counsel. In her letter, Mattox advised the General Counsel that Petitioner was contesting the proposed assessment and made the following argument in support of Petitioner's position that the Department had made "an error:"

> This tax has been assessed apparently because of a misunderstanding on the part of the auditors as to the arrangements under which Lauren, Inc. conducts business. As I am sure you are aware, under Rule 12A-1.004, Florida Administrative Code, there are various arrangements and agreements through which amusement and game machine owners conduct business. The first arrangement is where the machine owner rents the real property upon which the machine is located from the location owner. Under this arrangement, the machine owner pays a "lease fee" to the location owner, which fee is subject to sales and use tax. Under this arrangement, the location owner collects tax upon the lease fee and remits said tax to the state.
>
> The second arrangement through which amusement and machine owners conduct business is where the machine is rented by the location owner. Under this scenario, the machine owner acts as tax collector for the State and submits sales and use tax paid on the "rental fee" paid to the machine owner by the location owner.
>
> On March 25, 1991, Carmen R. Cordoba, C.P.N., Audit Group Supervisor with the Department of Revenue, wrote to Mr. Matthews indicating that the Department was construing the arrangement under which Mr. Matthews operated to be a lease of real property as opposed to the rental of personal property. Specifically, the Department stated the following: "we found them to be agreements to lease space to place the vending machines." To the contrary, Mr. Matthews' agreements are not for the rental of real property. Instead, he rents his personal property (the amusement and game machines) to the various locations. Under this scenario, Mr. Matthews is responsible for collecting sales and use tax on the rental fee paid to him and transmitting the sales and use tax thereon to the Department of Revenue. Apparently, the Department of Revenue has assessed an additional use tax on the payments made to the location owners where the Department has construed that Lauren, Inc. "rents space" for the machines. An additional tax has been assessed on the purchase of the machines, purchases of parts, etc... because the Department found that he was not renting these machines. This is simply in error.

> The Department has specified that Lauren, Inc. must refund all taxes collected from the location owners where Lauren, Inc., purportedly "rents space." At that point, Lauren, Inc. can apply for a refund on the taxes paid by Lauren, Inc. on the rental of the personal property. It is my opinion that this is a simple misunderstanding by the Department of Revenue staff as not understanding the arrangements made by Lauren, Inc. in conducting its business with various location owners.

24. On July 25, 1991, Mattox sent a copy of this letter to the Disposition Section of the Department's Bureau of Hearings and Appeals.

25. By letter dated September 6, 1991, the Administrator of the Sales Tax Appeals Section of the Department's Bureau of Hearings and Appeals gave notice that Mattox's July 22, 1991, letter, had "been accepted for review as a qualifying protest."

26. On November 13, 1991, a Notice of Decision was issued denying the protest.

27. The nature of the protest was described in the Notice of Decision as follows:

> Lauren, Inc. is protesting the assessment of use taxation for the rental of real property involving the following situations:
> 1. Taxation of purchases of vending machines, repairs and purchasers [sic] of parts; and
> 2. Tax erroneously collected to be reimbursed to customers/landlords and taxpayer to request a refund from D.O.R.

28. The following were set forth in the Notice of Decision as the "facts" pertinent to the protest:

> This is a first time audit of the taxpayer. The taxpayer is a full service vending machine business.
>
> The taxpayer has furnished representative contracts between his business and the location owners where his machines are placed. The specifics of the contracts are discussed below.
>
> According to the agreement, the taxpayer "installs, operates, services, and maintains coin operated machines on the proprietor's premises."
>
> The taxpayer has collected tax from location owners on their share of the proceeds, which he refers to as "rentals of the machine" to the location owners. The contract provides for the location owner to provide a space for the vending machines. It makes no reference whatsoever to a lease of the machine to

the location owner. The taxpayer collects the money from the machines, and when applicable, also provides and owns the merchandise.

29. The Notice of Decision contained the following discussion and analysis of the "law and [Petitioner's] argument:"

> You argue in the letter of protest that the Lauren, Inc. lease agreements are for the rental of personal property (the vending machines) to various locations. You state that "Mr. Matthews is responsible for collecting sales and use tax on the rental fee paid to him and transmitting the sales and use tax thereon to the Department of Revenue." You also state "an additional tax has been assessed on the purchase of the machine, purchases of parts, etc.... because the Department found that he was not renting these machines. This is simply in error."
>
> A tax is imposed on the privilege of engaging in the business of coin operated vending and amusement machines by Rule 12A-1.044(2)(A), F.A.C., which is written as follows:
>
> "(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."
>
> Rule 12A-1.044(4), F.A.C., states..."the purchase of amusement machines or merchandise vending machines and devices is taxable, unless purchased for exclusive rental."
>
> The effect of the agreement is utterly clear. Lauren, Inc. provides the food and cigarette items to be sold. The sales revenues belong to Lauren, Inc. Sales tax is due the state from Lauren, Inc. on the entire amount of those sales revenues. A share of the sales revenues is paid to the location owner by Lauren, Inc. as consideration for what the location owner has provided, a license to use his realty by placing the vending machines on the premises. NO RENT WHATSOEVER FOR THE MACHINES IS PAYABLE BY THE LOCATION OWNER TO LAUREN, INC. UNDER THE AGREEMENT.
>
> Generally, whether an agreement is a lease or a license depends upon the intent of the parties as determined from the entire agreement. In determining the intent of the parties, the fact that the parties

> may use terms such as "lease," "lessor," "lessee," or "rent" will not be determinative of whether an agreement is a lease.
>
> In Napoleon v. Glass, supra, 224 So.2d 883 (3d Dist. Ct. App. 1968), the court, at 884-885 states:
>
> "Although the parking concession agreement was called a Concession Lease and provided for the payment of 'rent,' the document unquestionably created a licensor-licensee relationship rather than a landlord-tenant relationship."

30. The "conclusion" that the Department reached by applying the foregoing principles of "law" to the pertinent "facts" in Petitioner's case was articulated as follows in the Notice of Decision:

> It is the Department's position that based upon the terms of the agreements provided by Lauren, Inc. that this is a license to use the location owner's real property rather than a lease of Lauren, Inc.'s tangible personal property to the location owners.
>
> Likewise, absent a re-rental of the vending machines, the sales tax is due from, Lauren, Inc. on its purchases of and repairs to its vending machines. Likewise, the taxes collected in error by the taxpayer from his customers should be reimbursed to the taxpayer's customers. The audit findings shall, therefore, remain as assessed.

31. The Notice of Decision advised Petitioner of its right to file a Petition for Reconsideration.

32. Such a Petition for Reconsideration was subsequently submitted on or about December 10, 1991, by Mattox on Petitioner's behalf.

33. In the Petition for Reconsideration, Mattox made the following argument:

> The Notice of Decision is flawed in all respects. With respect to issue No. 1, which the Tax Conferee [the author of the Notice] has entitled "Vending Machines," even the situations set forth are incorrect.
>
> Lauren, Inc. does not contest nor is there any issue related to any finding regarding its vending machines. There is simply no issue regarding vending machines. There is also no issue regarding the taxation of purchases of vending machines, repairs, and/or purchases or parts. Lauren, Inc., purchases its machines and performs repairs for machines that are rented to various locations.

> Therefore, under Rule 12A-1.044, Florida Administrative Code, these purchases and repairs are exempt from taxation.
>
> The only issue in this case is the factual scenario with which Lauren, Inc. conducts business. Under Rule 12A-1.044, Florida Administrative Code, there are several instances in which the rental of tangible personal property are recognized. The Tax Conferee has apparently ignored the industry standards in this regard and has misinterpreted the manner and method in which Lauren, Inc., conducts business.
>
> As I originally stated in my July 22, 1991 correspondence to the Department protesting the assessment of Sales and Use Tax, Lauren, Inc. has agreements with various location owners to place amusement and game machines at any particular location and the location owner rents Lauren, Inc.'s personal property (amusement and game machines). Even under the Location Lease Agreements that Lauren, Inc. has with its customers, they specify that the company (Lauren, Inc.) is in "the business of leasing, renting, servicing, operating, maintaining and repairing... coin operated machines..."
>
> I am absolutely confounded as to why the Department has determined that Lauren, Inc., owes the above-stated tax and penalty. There has never been any question that Lauren, Inc. collected tax from the various locations and remitted this tax to the Department of Revenue. It appears that Lauren, Inc. is now to apply for a refund to the Department of Revenue, pay all sums already paid to the Department of Revenue to the various locations where its machines are located, for the various locations to remit this same amount back to the Department of Revenue. This simply does not make sense to me.

34. With respect to the statement made in the Notice of Decision that the "effect of the agreement is utterly clear," Mattox continued:

> We are in complete agreement with the Tax Conferee in this regard, except for the fact that our conclusions are utterly inapposite. Lauren, Inc. does provide food and cigarette items to be sold out of the various machines, however, in this audit and protest, there is no issue regarding food and cigarette items or the tax paid thereon. The only issue is the [e]ffect of the agreement between Lauren, Inc. and the location owners. If the Tax Conferee had characterized this relationship correctly, a completely different result would have been reached. Lauren, Inc. does have vending machines as well as amusement and game machines. The Tax

> Conferee may have confused the vending arrangements with location owners with the amusement and game agreements. There is a recognized difference industry wide in the method and manner within which vending businesses and amusement and game business are conducted. There has been no such recognition by the Tax Conferee and we would sincerely appreciate the opportunity to present additional evidence, if necessary, to the Department of Revenue for its reconsideration of the issues raised herein.

35. Sometime after it received the Petition for Reconsideration, the Department, through one of its employees, Vicki Allen, telephoned Mattox and asked her to provide the Department with any additional materials she wanted the Department to consider.

36. Mattox responded to this request by letter dated February 19, 1992, in which she stated the following:

> You have requested that I provide additional information regarding Lauren, Inc. however, in lieu of providing this information through the mails, I would like the opportunity to sit down and explain in person our position regarding the sales and use tax assessments set forth in the recent assessment.
>
> Moreover, I am not certain as to whether any additional documentation or information exists or the nature of the documentation that will be helpful to you. Upon your receipt of this correspondence, please contact me to discuss this matter further. We are more than willing to provide additional information, but truly believe that the issues involved in this assessment could be resolved through a meeting between all parties concerned. Please advise accordingly.

37. Allen never responded to Mattox's letter.

38. On April 21, 1992, the Department issued a Notice of Reconsideration sustaining an assessment against Petitioner in the amount of $206,017.85 for taxes owed (plus penalty and interest).

39. Allen was the author of the Notice of Reconsideration.

40. The following were set forth in the Notice of Reconsideration as the "facts" upon which the sustained assessment was based:

> Lauren, Inc. is in the business of owning and operating coin-operated vending machines. The corporation entered into various agreements under which it received permission to install, place, operate, service and maintain its coin-operated vending machines on the premises of various

> location owners in return for an agreement to pay the location owners a percentage of the gross receipts from the machines.
>
> The corporation interpreted the agreements to be transactions involving the rental of tangible personal property and not for the license to use real property. Therefore the corporation collected and remitted tax on the gross receipts taken from the machines and from the location owners on the rental of the machines as provided under Rule 12A-1.044(2)(b), F.A.C.
>
> The auditor determined that the agreements between Lauren, Inc. and the location owners, involving the placement of vending machines at the various location owner's premises, were agreements made for the license to use real property and not for the rental of tangible personal property. Therefore, the auditor assessed use tax on these transactions. In addition, the auditor assessed use tax on the purchases made by Lauren, Inc. for the coin-operated machines, parts, and accessories.
>
> The only issue maintained by you is whether or not the agreements between Lauren, Inc. and the location owners were agreements for the license to use real property or whether the agreements constitute the rental of tangible personal property and would therefore, exempt the purchases of the coin operated vending machines, parts, and accessories as provided under Rule 12A-1.044(2)(B), F.A.C.

41. In the Notice of Reconsideration, the Department cited Section 66 of Chapter 86-152, Laws of Florida, which, the Department stated in the Notice, "amended Section 212.031, Florida Statutes, (F.S.), effective July 1, 1986, to make licenses to use real property, as well as leases, subject to tax."

42. The Notice of Reconsideration also contained the following excerpt from Rule 12A-1.070, Florida Administrative Code:

> "(g) An agreement whereby the owner of real property grants another person permission to install and maintain a full service coin-operated vending machine, coin-operated amusement machine, coin-operated laundry machine, or any like items, on the premises is a taxable use of real property. The consideration paid by the machine owner to the real property owner is taxable."
> [Emphasis in original.]

43. In addition, the provisions of subsections (2)(a), (b) and (c) of the Rule were recited in the Notice of Reconsideration.

44. Allen stated her "conclusion" as follows in the Notice of Reconsideration:

> A review of the agreements presented in the audit file was made by this writer and the following conclusion was made:
>
> 1. The agreements clearly reflect that Lauren, Inc. is installing, placing, operating and maintaining the coin-operated vending machines on the various location owner's realty for a percentage of the gross proceeds.
>
> 2. Nowhere in the agreements does it state that Lauren, Inc. is leasing or renting the coin-operated vending machines to the location owner for a percentage of the gross proceeds.
>
> 3. The agreements do, however, specifically state that the location owner will provide a space for Lauren, Inc. to install, operate, service, and maintain a coin-operated vending machine on the location owner's premises.
>
> The agreements made between Lauren, Inc., the owner of the machines[,] is and has been since July 1, 1986, a taxable license to use real property. Before that date, amounts paid for leases of real property were taxable, but licenses to use were not. Black's Law Dictionary defines a license to use real property as:
>
> "a privilege to go on premises for a certain purpose, but does not operate to confer on, or vest in a licensee any title, interest, or estate in such property."
>
> The agreements did not confer to Lauren, Inc. any "title, interest, or estate" in the location owner's realty, but, instead, only permitted Lauren, Inc. to come onto the property and place the coin-operated vending machines on the property for the purpose of making the machines available to those who wanted to use them.
>
> It is the Department's decision that the subject tax was assessed correctly pursuant to Rule 12A-1.070(1)(g), F.A.C. and 12A-1.044(2)(a) and (c), F.A.C. and in accordance with Departmental policies and procedures. The audit findings shall remain as assessed in the enclosed closing statement.

Particularly in light of the provision of Rule 12A-1.070, Florida Administrative Code, set forth in the Notice of Reconsideration, the agreements that Petitioner had provided the Department were reasonably susceptible to the interpretation that they were, as Allen had concluded, "taxable license[s] to use real property," notwithstanding that the parties to these agreements had intended that they be interpreted otherwise.

45. The Notice of Reconsideration advised Petitioner of its right "to file a petition for a Chapter 120 administrative hearing with the Department."

46. Petitioner filed such a petition with the Department on May 8, 1992.

47. The Department referred the matter to the Division of Administrative Hearings on June 18, 1992, for the assignment of a Hearing Officer to conduct the hearing Petitioner had requested.

48. The hearing was held on October 6, 1992.

49. Two witnesses testified at the hearing, Matthews and Manley Lawson, a member of the Board of Directors of the Florida Amusement and Vending Association. In addition to the testimony of these two witnesses, a total of 11 exhibits were offered and received into evidence.

50. The evidence presented at hearing was supplemented by a stipulation into which the parties had entered prior to hearing.

51. On November 23, 1992, the Hearing Officer issued a Recommended Order recommending that the Department "enter a final order withdrawing the assessment that is the subject of the instant proceeding."

52. The Hearing Officer's recommendation was based upon the following Conclusions of Law set forth in his Recommended Order:

> 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 percent 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." 3/

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 agreements, 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.

53. The Department, on January 15, 1993, issued a Final Order adopting the Hearing Officer's Findings of Fact and Conclusions of Law and his recommendation that the subject assessment be withdrawn.

CONCLUSIONS OF LAW

Section 57.111, Florida Statutes

54. Petitioner is seeking an award of attorney's fees and costs in the instant case pursuant to Section 57.111, Florida Statutes, subsection (4)(a) of which provides as follows:

> Unless otherwise provided by law, an award of attorney's fees and costs shall be made to a prevailing small business party in any adjudicatory proceeding or administrative proceeding pursuant to chapter 120 initiated by a state agency, unless the actions of the agency were substantially justified or special circumstances exist which would make the award unjust.

55. A party seeking such an award of "attorney's fees and costs" 4/ has the initial burden of proving that it is a "small business party," within the meaning of the statute, which had prevailed in an earlier "adjudicatory proceeding or administrative proceeding pursuant to chapter 120 initiated by a state agency." Once such proof has been submitted, the burden shifts to the agency to establish by a preponderance of the evidence that its actions in initiating the proceeding "were substantially justified or special circumstances exist which would make the award unjust." See Department of Professional Regulation, Division of Real Estate v. Toledo Realty, Inc., 549 So.2d 715, 717-18 (Fla. 1st DCA 1989). An agency meets its burden of demonstrating that its actions were "substantially justified" by showing that the proceeding "had a reasonable basis in law and fact at the time it was initiated." Section 57.111(3)(e), Fla. Stat.; Gentele v. Department of Professional Regulation, Board of Optometry, 513 So.2d 672 (Fla. 1st DCA 1987).

56. In the instant case, it is undisputed that Petitioner was a "prevailing small business party" in an "administrative proceeding pursuant to chapter 120 initiated by a state agency." 5/

57. The only issue that needs to be resolved to determine Petitioner's entitlement to an award pursuant to Section 57.111, Florida Statutes, is whether the Department met its burden of establishing that it was "substantially justified" in initiating the proceeding.

58. An examination of the evidentiary record in this case reveals that the Department did meet its burden of proof on this issue.

59. The evidentiary record affirmatively establishes that the assessment against Petitioner that the Department sustained in its Notice of Reconsideration had a reasonable basis in law and fact at the time the Notice issued, notwithstanding that the Department's interpretation of the transactions upon which the assessment was based as involving licenses to use real property, and therefore subject to the tax consequences prescribed in subsection (2)(c), rather than (2)(b), of the Rule, may not have been the only, or even, in the opinion of some, the most preferable, interpretation possible and further notwithstanding that such interpretation was subsequently rejected by the

Department in favor of the interpretation urged by Petitioner, which was deemed to be more consistent with the intent of the parties to the transactions. C.f. Edward J. Seibert, Architect and Planner, P.A., v. Bayport Beach and Tennis Club Association, 573 So.2d 889, 892 (Fla. 2d DCA 1990)("[w]hen an agency with the authority to implement a statute construes the statute in a permissible way, that interpretation must be sustained even though another interpretation may be possible"); Gentele v. Department of Professional Regulation, Board of Optometry, 513 So.2d 672, 673 (Fla. 1st DCA 1987)("DPR's determination to prosecute essentially turned on a credibility assessment of the investigator's testimony and, as such, had a reasonable basis in law and fact"); Humhosco v. Department of Health and Rehabilitative Services, 476 So.2d 258, 261 (Fla. 1st DCA 1985)("[w]hen an agency committed with authority to implement a statute construes the statute in a permissible way, that interpretation must be sustained even though another interpretation may be possible or even, in the view of some, preferable").

60. Because the preponderance of the evidence establishes that the Department was "substantially justified" in initiating the underlying administrative proceeding, Petitioner is not entitled to an award of attorney's fees and costs under Section 57.111, Florida Statutes, for fees and costs it incurred as a result of its participation in the proceeding. See Gentele v. Department of Regulation, Board of Optometry, 513 So.2d 672 (Fla. 1st DCA 1987).

Section 57.105, Florida Statutes

61. Section 57.111, Florida Statutes, is not the only statute upon which Petitioner relies in support of its position that the Hearing Officer should require the Department to pay these attorney's fees and costs.

62. Petitioner also contends that the provisions of Section 57.105(1), Florida Statutes, as well as those of Section 120.575, Florida Statutes, authorize the Hearing Officer to make such an award.

63. Section 57.105(1), Florida Statutes, provides as follows:

> The court shall award a reasonable attorney's fee to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney in any civil action in which the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the complaint or defense of the losing party; provided, however, that the losing party's attorney is not personally responsible if he has acted in good faith based upon the representations of his client. If the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the defense, the court should also award prejudgment interest.

64. Statutes such as Section 57.105, Florida Statutes, which authorize an award of attorney's fees are in derogation of the common law and therefore must be strictly construed. See Whitten v. Progressive Casualty Insurance, Co., 410 So.2d 501, 505 (Fla. 1982); Certain Lands v. City of Alachua, 518 So.2d 387, 388 (Fla. 1st DCA 1987).

65. Moreover, no statute may be construed in such a manner as to add words omitted from the statute by the Legislature. See In Re Order on Prosecution of Criminal Appeals By Tenth Judicial Circuit Public Defender, 561 So.2d 1130, 1137 (Fla. 1990); Chafee v. Miami Transfer Company, Inc., 288 So.2d 209, 215 (Fla. 1974).

66. To construe Section 57.105(1), Florida Statutes, as authorizing Hearing Officers of the Division of Administrative Hearings to award a reasonable attorney's fee to a prevailing party in an administrative proceeding, when the Legislature has employed language in the statute that plainly appears, particularly when compared to the language used elsewhere in Chapter 57, Florida Statutes, specifically Section 57.111, Florida Statutes, to limit the authority to award such a fee under Section 57.105(1), Florida Statutes, to a "court" in a "civil action," would certainly run counter to these well established rules of statutory construction.

67. Accordingly, the Hearing Officer declines to adopt such an interpretation and, instead, finds that under no circumstances does he have the authority to make a fee award under Section 57.105(1), Florida Statutes.

Section 120.575, Florida Statutes

68. Section 120.575(5), Florida Statutes, provides as follows:

> The prevailing party in a proceeding under s. 120.57 authorized by s. 72.01(1), may recover all legal costs incurred in such proceeding, including reasonable attorney's fees, if the losing party fails to raise a justiciable issue of law or fact in its petition or response.

69. This statutory provision took effect on October 1, 1992, after the Department had filed its response to Petitioner's petition for an administrative hearing.

70. Accordingly, it may not be applied to support an award of attorney's fees and costs against the Department. See Florida Patients Compensation Fund v. Scherer, 558 So.2d 411, 414 (Fla. 1990); Wilson Insurance Service v. West American Insurance Company, 608 So.2d 857, 858 (Fla. 4th DCA 1992); Parrish v. Mullis, 458 So.2d 401, 402 (Fla. 1st DCA 1984).

71. In any event, even if Section 120.575, Florida Statutes, had been in effect at the time of the filing of the Department's response to the petition, the Department would still not be liable to pay Petitioner's attorney's fees and costs thereunder, inasmuch as the position taken by the Department in its response was not only, at the time, non-frivolous, it had, as explained above, a reasonable basis in law and fact and therefore was substantially justified. Cf. Department of Health and Rehabilitative Services v. S.G., 613 So.2d 1380, 1386 (Fla. 1st DCA 1993)("erroneous to equate "a finding of 'no frivolous purpose' with a finding of 'substantial justification,' as that phrase is defined in subsection 57.111(3)(e)," Florida Statutes; "while governmental action may not be so unfounded as to be frivolous, it may nonetheless be based on such an unsteady foundation factually and legally as not to be substantially justified);" Lambert v. Nelson, 573 So.2d 54, 56 (Fla. 1st DCA 1990)("[t]otal or absolute lack of a justiciable issue is tantamount to a finding that the action is frivolous;" "'[t]he frivolousness of a claim or a defense is to be judged and determined as of the time it is initially presented, and if it can

pass muster at that point, subsequent developments which render the claim or the defense to be without justiciable issue in law or fact should not subject the losing party to attorney's fees'"); Marexcelso Compania Naviera v. Florida National Bank, 533 So.2d 805 (Fla. 4th DCA 1988)(error to award attorney fees under Section 57.105, Florida Statutes, 6/ "on the theory that the action against the Bank, although not initially frivolous, became frivolous after a certain point in the case").

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

ORDERED that Petitioner's application for an award of attorney's fees and costs is DENIED.

DONE AND ENTERED in Tallahassee, Leon County, Florida, this 20th day of December, 1993.

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 20th day of December, 1993.

ENDNOTES

1/ In the underlying administrative proceeding, Respondent conceded that, if these agreements had involved the rental of tangible personal property by the location owners as Petitioner contended, it would agree that Petitioner had collected and remitted the "correct" amount of sales tax; and it further conceded that such amount was "no different than the total amount that [Petitioner] would have paid its location owners in sales tax" had these agreements been treated, as Respondent contended they should have been, as rentals of real property by Petitioner.

2/ Mattox, in her capacity as the General Counsel for the Florida Amusement and Vending Association, had previously, during 1988 and 1989, met with Department representatives and provided them with input as to how the Rule should be drafted to properly reflect the "industry custom."

3/ It is apparent from a reading of this "example," as well as the provisions of subsection (2)(A), that the framers of the Rule recognized that there were be circumstances under which an arrangement between an amusement and game machine owner and a location operator could be considered a license to use real property.

4/ "Attorney's fees and costs," as that term is used in Section 57.111, Florida Statutes, "means the reasonable and necessary attorney's fees and costs incurred for all preparations, motions, hearings, trials, and appeals in a proceeding."

5/ According to Section 57.111(3)(b), Florida Statutes, the term "initiated by a state agency" means that the state agency:

1. Filed the first pleading in any state or federal court in this state;
2. Filed a request for an administrative hearing pursuant to chapter 120; or
3. Was required by law or rule to advise a small business party of a clear point of entry after some recognizable event in the investigatory or other free-form proceeding of the agency.

6/ In its proposed final order, Petitioner correctly observes that "[t]here are relatively few, if any, cases interpreting Section 120.575, Florida Statutes, but the requirements of Section 57.105, Florida Statutes, provides a comparable, if not identical, standard for an award of attorney's fees."

APPENDIX TO FINAL ORDER
IN CASE NO. 93-0256F

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"

14. Rejected as a finding of fact because it is more in the nature of a conclusion of law.

15. Accepted and incorporated in substance, although not necessarily repeated verbatim, in this Final Order.

16. First sentence: Rejected because it is more in the nature of a summary of testimony than a finding of fact based upon such testimony; Second sentence: Accepted and incorporated in substance; Third sentence: Rejected because it would add only unnecessary detail to the factual findings made by the Hearing Officer.

17-19. Rejected as findings of fact because they are more in the nature of statements of the law.

18. First sentence: To the extent that this proposed finding asserts that representatives of the Florida Amusement and Vending Association had met with Department representatives and provided them with input as to how the Rule should be drafted to properly reflect the "industry custom," it has been accepted and incorporated in substance. To the extent that it states that it was the intent of the Department officials to draft the Rule to provide that, in all instances, agreements between amusement and game machine owners and location operators should be construed as the location operator's rental of the machine owner's tangible personal property, as is the "industry custom," regardless of the language contained in their agreement, it has been rejected because it is not supported by persuasive competent substantial evidence; Second sentence: Accepted and incorporated in substance; Third sentence: Rejected because it is not supported by persuasive competent substantial evidence; Fourth sentence: To the extent that this proposed finding asserts that it was the intent of the Department officials to draft the Rule to provide that, in all instances, agreements between amusement and game machine owners and location operators should be construed as the location operator's rental of the machine owner's tangible personal property, as is the "industry custom," regardless of the language contained in their agreement, it has been rejected because it is not supported by persuasive competent substantial evidence. To the extent that it

states that "subsection (7)(a) deals specifically with an example as to who has the tax paying responsibility related to coin-operated amusement and game machines," it has been rejected as a finding of fact because it is more in the nature of a statement of the law; Fifth sentence: Rejected as a finding of fact because it is more in the nature of a statement of the law.

21. Accepted and incorporated in substance.

22. First sentence: Accepted and incorporated in substance; Second sentence: To the extent that this proposed finding asserts that there was evidence before the auditors supporting the conclusion that "the arrangement that Lauren, Inc. had with its various locations constituted a lease of tangible personal property as opposed to a lease of real property," it has been accepted and incorporated in substance. To the extent that it suggests that they had no evidence to support a contrary conclusion, it has been rejected because it is not supported by persuasive competent substantial evidence.

23. To the extent that this proposed finding states that the auditors' conclusion was contrary to the provisions of the Rule, it has been rejected as a finding of fact because it is more in the nature of a conclusion of law. Otherwise, it has been accepted and incorporated in substance.

24. Rejected because it is not supported by persuasive competent substantial evidence.

25-30. Accepted and incorporated in substance.

31. Last sentence: Rejected because it would add only unnecessary detail to the factual findings made by the Hearing Officer; Remaining sentences: Accepted and incorporated in substance.

32-33. Accepted and incorporated in substance.

34. To the extent that this proposed finding asserts that in her July 22 and 25, 1991, letters, Mattox "again reminded" the Department of the "industry custom," it has been rejected because it is not supported by persuasive competent substantial evidence. Otherwise, it has been accepted and incorporated in substance.

35. Accepted and incorporated in substance.

36. Rejected because it would add only unnecessary detail to the factual findings made by the Hearing Officer.

37. First and second sentences: Accepted and incorporated in substance; Third sentence: Rejected because it is not supported by persuasive competent substantial evidence.

38. Rejected because it is not supported by persuasive competent substantial evidence.

39-43. Accepted and incorporated in substance.

44. First sentence: Accepted and incorporated in substance; Second sentence: To the extent that this proposed finding suggests that the assessment was based solely upon the "conception that the Department was dealing with 'vending machines,' rather than 'amusement and game machines,'" it has been rejected because it is not supported by persuasive competent substantial evidence. Otherwise, it has been accepted and incorporated in substance.

45-47. Accepted and incorporated in substance.

48. Before second comma: Accepted and incorporated in substance; After second comma: Rejected because, even if it were true, it would have no impact upon the outcome of the instant case inasmuch as the Department, through its representatives, did not "view. . . these machines with the naked eye." It simply, in accordance with subsection (2)(a) of the Rule, reviewed the agreements into which Petitioner had entered.

49. Rejected because it would add only unnecessary detail to the factual findings made by the Hearing Officer.

50-51. Accepted and incorporated in substance.

52-56. Rejected because they would add only unnecessary detail to the factual findings made by the Hearing Officer.

Respondent's Proposed "Findings of Fact"

1-4. Accepted and incorporated in substance.

5-6. Rejected as findings of fact because they are more in the nature of statements of the law.

7. Accepted and incorporated in substance.

8. To the extent that this proposed finding suggests that the Department's auditors are, for the most part, college-trained accountants and that they receive Department-sponsored training in the general procedures and standards they are expected to adhere to in conducting their audits, but are not provided with training and information regarding the trade customs and practices that are unique to particular industries or businesses they audit, it has been accepted and incorporated in substance. Otherwise, it has been rejected because it is not supported by persuasive competent substantial evidence.

9-13. Accepted and incorporated in substance.

14. Rejected as a finding of fact because it is more in the nature of a conclusion of law.

15. Accepted and incorporated in substance.

16-18. Rejected as findings of fact because they are more in the nature of statements of the law.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this final order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a notice of appeal with the Agency Clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the district court of appeal in the appellate district where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.