STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SHERATON ASSOCIATES OF ORANGE PARK,)
)
Petitioner,)
)
vs.) CASE NO. 93-3269
)
STATE OF FLORIDA,)
DEPARTMENT OF REVENUE,)
)
Respondent.)
______________________________________)

RECOMMENDED ORDER

The final hearing in this was held before Larry J. Sartin, Hearing Officer, on November 3, 1994 in Lake City, Florida.

APPEARANCES

For Petitioner: Thomas W Brown, Esquire
Brannon, Brown, Haley, Robinson
& Cole, P.A.
Post Office Box 1029
Lake City, Florida 32056-1029

For Respondent: Olivia P. Klein
Assistant Attorney General
Tax Section, Capitol Building
Department of Legal Affairs
Tallahassee, Florida 32399-1050

STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner is liable for additional sales tax in the amount of $71,118.95, plus penalties and interest, for the period July 1, 1987 through February 13, 1991.

PRELIMINARY STATEMENT

Respondent, the Florida Department of Revenue, conducted an audit of Petitioner, Sheraton Associates of Orange Park, Ltd., for the period July 1, 1987 through February 13, 1991. As a result of the audit, Respondent issued a Notice of Proposed Assessment on March 24, 1992.

On or about November 30, 1992, Respondent issued a Notice of Decision determining Petitioner to be liable for the audit assessment. Petitioner filed a Petition for Reconsideration dated December 30, 1992. On or about April 13, 1993, Respondent issued a Notice of Reconsideration of Notice of Decision. Respondent sustained the audit assessment against Petitioner

On or about June 9, 1993, Petitioner filed a Petition for Formal Administrative Proceedings with Respondent requesting a formal administrative hearing to contest Respondent's determination. The request for hearing was filed with the Division of Administrative Hearings on June 10, 1993.

The final hearing of this matter was scheduled for October 25, 1993, by a Notice of Hearing entered June 29, 1993. The hearing was subsequently continued three times at the request of the parties to give the parties an opportunity to settle their dispute.

By Order entered April 5, 1994, Petitioner was granted leave to file an amended petition.

At the final hearing Petitioner presented the testimony of Greg Kaylor and Philip A. Browning, Jr. Respondent presented the testimony of James Estey and Perry L. Brown. The parties offered eight exhibits, including the deposition testimony of Alan Markey Vaughn, as joint exhibits. The joint exhibits were accepted into evidence.

The parties stipulated that the allegations of fact contained in paragraphs 1 through 10 (first paragraph only), and 11 through 13 of the amended petition are true. Those facts have been included, to the extent relevant, in this Recommended Order.

A transcript of the final hearing was filed on December 19, 1994. Therefore, proposed recommended orders were required to be filed on or before January 18, 1995. On December 22, 1994, Respondent filed an Agreed Motion to Set Date Certain for Service of Parties' Proposed Recommended Orders. The motion was granted by an Order entered December 23, 1994. Proposed recommended orders were required to be served on or before January 30, 1995.

The parties filed proposed recommended orders on January 30, 1995. A ruling on each proposed finding of fact contained in the proposed orders filed by the parties has been made either directly or indirectly in this Recommended Order or the proposed finding of fact has been accepted or rejected in the Appendix which is attached hereto.

FINDINGS OF FACT

A. The Parties.

1. Petitioner, Sheraton Associates of Orange Park, Ltd. (hereinafter referred to as "Sheraton Associates"), was formed as a Florida limited partnership on November 15, 1973. It was formed to own a motel in Orange Park, Florida. The business address of Sheraton Associates is Post Office Box 724848, Atlanta, Georgia 31139

2. At all times relevant to this proceeding, Philip A. Browning, Jr., was the general partner of Sheraton Associates.

3. Respondent, the Department of Revenue (hereinafter referred to as the "Department"), is an agency of the State of Florida charged with responsibility for, among other things, the assessment and collection Florida sales and use tax. Chapter 212, Florida Statutes.

4. The following information was stipulated to be correct by the parties:

a. Sheraton Associates' employer identification number: 58-1178445;

b. DTA Number: 9201194;

c. Audit Number: 9021109195 Audit Period: 7/1/87 - 2/13/91;

d. Proposed Assessment and Sustained Amount: $69,142.65;

e. Local Government Infrastructure-Surtax
Audit Period: 2/1/90 - 2/13/91
Proposed Assessment and Sustained Amount: $1,976.30;

f. Amount Contested: Sales Tax $69,142.54
Surtax $ 1,976.30

B. The Operation of Sheraton Associates.

5. From 1974 until February 13, 1991, Sheraton Associates owned a Best Western Motel (hereinafter referred to as the "Motel"), located in Orange Park, Florida. The Motel (land and building) was the sole asset of Sheraton Associates.

6. The purchase of the land and building for the Motel was financed through Freedom Federal Savings and Loan of Tampa, Florida. Sheraton Associates executed a Promissory Note and a Mortgage securing the payment of the note to Freedom Federal Savings and Loan.

7. Sheraton Associates entered into a management agreement with Orange Park Associates, Inc. (hereinafter referred to as "Orange Park Associates"). Pursuant to the agreement, Orange Park Associates operated the Motel, including the restaurant and lounge, owned by Sheraton Associates.

8. Philip Browning, Jr., was the president and a director of Orange Park Associates. Mr. Browning was also the general partner of Sheraton Associates. Mr. Browning executed and delivered to Freedom Federal Savings and Loan as further security for the Promissory Note from Sheraton Associates a Collateral Assignment of Rents and Leases, an Assignment of Contracts, Licenses, Permits, Trade Names and Documents and a Security Agreement for all other tangible and intangible personal property.

9. Orange Park Associates operated the Motel on behalf of Sheraton Associates for over sixteen years. The manager of the Motel was Greg Kaylor.

C. The Resolution Trust Corporation's Takeover of the Motel Property.

10. The Resolution Trust Corporation (hereinafter referred to as the "RTC"), took over all of the assets of Freedom Federal Savings and Loan as receiver in late 1989 or early 1990.

11. Sheraton Associates defaulted on the Promissory Note to Freedom Federal Savings and Loan. The RTC, therefore, commenced foreclosure on the property of Sheraton Associates. A Notice of Lis Pendens seeking foreclosure on the mortgage on the Motel property formerly held by Freedom Federal Savings and Loan was issued by the RTC on or about July 16, 1990.

12. A Final Judgment of Foreclosure was entered in the Circuit Court, Fourth Judicial Circuit, in and for Clay County, Florida, on or about December 7, 1990.

13. On or about February 13, 1991, the RTC took title to the Motel property pursuant to foreclosure. The RTC continued to operate the Motel through an entity known as Real Estate Recovery. Real Estate Recovery in turn operated the Motel through an entity known as Tecton.

14. Mr. Kaylor was hired by Tecton. As of February 14, 1991, Mr. Kaylor became manager of the Motel on behalf of Tecton.

D. The Department's Audit.

15. On or about March 12, 1991, James Estey informed Mr. Kaylor that the Department intended to conduct an audit of the operation of the Motel. The originally planned audit period was modified to reflect the transfer of the assets of Sheraton Associates by Mr. Estey. The modified audit period was July 1, 1987 through February 13, 1991.

16. Although Mr. Kaylor was employed by Tecton after February 13, 1991, Mr. Kaylor continued to act on behalf of Sheraton Associates with the Department.

17. Mr. Kaylor made the records of the Motel available to Mr. Estey, acted as the contact person for Sheraton Associates with Mr. Estey and kept Philip Browning informed about the progress of the audit.

18. During Mr. Estey's first conversation with Mr. Kaylor, Mr. Estey was informed that the RTC was the owner of the Motel property. Mr. Kaylor told Mr. Estey that the RTC had taken over the property by "foreclosure."

19. Mr. Estey did not know what the RTC was. Nor did Mr. Estey understand the RTC's connection with the Federal government. Mr. Estey assumed that the RTC was simply a corporate business entity.

20. The evidence failed to prove that Mr. Kaylor told Mr. Estey that Sheraton Associates had declared "bankruptcy." The Department, however, because of Mr. Estey's lack of understanding of the RTC, believed that a transfer of the assets of Sheraton Associates had been transferred pursuant to a bankruptcy sale.

21. The audit of Sheraton Associates commenced in May of 1991.

22. On or about August 30, 1991, Mr. Estey presented his audit findings to Mr. Kaylor by Notice of Intent to Make Sales and Use Tax Audit Changes. Mr. Estey had determined that Sheraton Associates owed additional sales tax, plus penalties and interest, for the audit period of $71,118.00

23. When informed that there was additional tax due for the audit period, Mr. Kaylor inquired of Mr. Estey as to whether Sheraton Associates was liable for the tax. Mr. Estey still believed that the RTC was just another corporation and that the RTC had "acquired" the Motel property through bankruptcy. Therefore, Mr. Estey informed Mr. Kaylor that the RTC would be liable for the sales tax deficiency absent an agreement between Sheraton Associates and the RTC to the contrary.

24. Mr. Kaylor informed Philip Browning of Mr. Estey's representations. Philip Browning directed Mr. Kaylor to get the representation in writing from Mr. Estey. Mr. Kaylor, therefore, requested that Mr. Estey confirm his representations in writing concerning the liability of the RTC.

25. On September 4, 1991, Mr. Estey wrote, in part, the following to Mr. Kaylor:

> * * *
> I checked with my supervisor, Mr. Perry Brown, that DOR has no way of finding out if a private agreement between Mr. Browning and the RTC exists regarding tax liability. My supervisor's position is that if an agreement does not exist, then the liability for the taxes due falls on the RTC per Florida law since RTC acquired the business and is running it.
>
> You may want to call Perry Browning for further clarification on this particular issue. He may be reached at 359-6077 also.

Joint Exhibit 1.

26. Mr. Kaylor confirmed Mr. Estey's representations in the September 4, 1991 letter by speaking by telephone with Mr. Estey's immediate supervisor, Perry Brown. Perry Brown confirmed the representations of the letter.

27. Based upon Mr. Estey's letter of September 4, 1991, Sheraton Associates took no immediate action to contest the sales tax deficiency alleged in the August 30, 1991 Notice of Intent.

28. Information concerning the results of the audit were went to Philip Browning.

29. Despite having been told that the RTC was liable for the sales tax deficiency, on or about September 27, 1991, Alan Vaughn, Sheraton Associates' accountant, requested an extension of time to challenge the findings of the August 30, 1991 Notice of Intent. That request was granted and Sheraton Associates was given until October 30, 1991, to respond to the Notice of Intent.

E. The Department's Change in Position.

30. In October of 1991 Mr. Estey telephoned Real Estate Recovery's or Tecton's offices. For the first time, Mr. Estey realized that the RTC was not a corporate business and that it was an agency of the Federal government.

31. Mr. Estey informed his supervisor, Perry Brown, who also was not aware of what the RTC was, of his discovery concerning the RTC. Perry Brown then wrote Mr. Vaughn on or about November 7, 1991 and informed him of the following:

> Jim Estey contacted a representative of the Resolution Trust Corporation and he is of the opinion that Sheraton [sic] Associates of Orange Park would be liable for the tax due on this audit. I would agree with this as the tax was or should have been collected

by them. They took over the operation in lieu of foreclosure and did not purchase the business.

I am extending the due date of the Notice of Intent to make Audit changes until December 6, 1991. [Emphasis added].

* * *

F. Sheraton Associates' Protest.

32. By letter dated December 5, 1991, Sheraton Associates timely protested the Department's determination of a sales tax deficiency. Sheraton Associates contended that any tax deficiency was payable by the RTC and not Sheraton Associates. Sheraton Associates did not challenge the accuracy of the alleged sales tax deficiency in it's protest of December 5, 1991, or at any subsequent time.

33. On November 30, 1992, the Department issued a Notice of Decision sustaining the assessment.

34. On December 30, 1992, Sheraton Associates filed a Petition for Reconsideration of Notice of Decision.

35. On April 13, 1993, the Department issued a Notice of Reconsideration sustaining the assessment.

G. Sheraton Associates' Detriment.

36. The evidence in this case failed to prove that Sheraton Associates relied upon the Department's initial representation that the RTC was liable for the sales tax deficiency at issue in this proceeding to its detriment.

37. On August 30, 1991, Sheraton Associates was first informed by Notice of Intent to Make Sales and Use Tax Audit Changes that Sheraton Associates was liable for additional sales and use tax. Sheraton Associates was informed that it could challenge this determination. While the Department erroneously informed Sheraton Associates on September 4, 1991, that RTC was liable for the tax, Mr. Vaughn, Sheraton Associates' accountant, was aware that the matter was not final because of the outstanding August 30, 1991 Notice of Intent. Therefore, on September 27, 1991, Mr. Vaughn requested an extension of time in which to respond to the August 30, 1991 Notice. The time within which to file a challenge to the Department's Notice of Sheraton Associate's liability was extended until October 30, 1991. No effort was made by Sheraton Associates to challenge the outstanding Notice of Intent, and it was not reasonable for Sheraton Associates to ignore that Notice of Intent based upon a hand written letter from the Department's auditor.

38 The Department reversed the position asserted in the September 4, 1991 letter from Mr. Estey on or about November 7, 1991. When informed of the change in the Department's position, Sheraton Associates was given until December 6, 1991 to protest the Notice of Intent. This extension eliminated any possible detriment to Sheraton Associates of the original representation from Mr. Estey by giving Sheraton Associates an opportunity to do what it could have done when first informed on August 30, 1991, that there was a sales tax deficiency: challenge the Department's findings. Sheraton Associates in fact did so.

39. In support of its position that it suffered a detriment as a result of Mr. Estey's letter, Sheraton Associates has asserted that it did not assess the audit findings when they were first presented. The evidence failed to prove that Sheraton Associates was prejudiced by not acting immediately or that its actions in not protesting immediately were reasonable in light of the fact that the Notice of Intent had not been withdrawn or modified by the Department.

40. Sheraton Associates has also asserted that its failure to retain its records, which in turn makes it difficult to contest the Department's audit findings, is part of its detrimental reliance. The evidence failed to prove, however, when Sheraton Associates disposed of its records. In light of the fact that the Notice of Intent issued on August 30, 1991, was not withdrawn or modified by the Department to reflect the position asserted by Mr. Estey's September 4, 1991 letter, it was not reasonable for Sheraton Associates to dispose of the records.

41. Finally, Sheraton Associates assertion that it failed to pursue the RTC was caused by Mr. Estey's letter. Again, it was unreasonable for Sheraton Associates to rely on Mr. Estey's letter and not pursue the RTC while the Notice of Intent remained outstanding.

CONCLUSIONS OF LAW

A. Jurisdiction.

42. The Division of Administrative Hearings has jurisdiction of the parties to and the subject matter of this proceeding. Section 120.57(1), Florida Statutes (1993).

B. Burden of Proof.

43. The burden of proof absent a statutory directive to the contrary is on the party asserting the affirmative of the issue of the proceeding. Antel v. Department of Professional Regulation, 522 So.2d 1056 (Fla. 5th DCA 1988); Department of Transportation v. J.W.C. Co. Inc., 396 So.2d 778 (Fla. 1st DCA 1981); and Balino v. Department of Health and Rehabilitative Services, 348 So.2d 249 (Fla. 1st DCA 1977).

44. In this proceeding the burden of proof was on Sheraton Associates to prove by a preponderance of the evidence that it is not liable for additional sales tax for the audit period. Section 120.575(2), Florida Statutes.

C. Was there a Sale of the Business by Sheraton Associates to the RTC Pursuant to Section 212.10(1), Florida Statutes.

45. Section 212.10(1), Florida Statutes, governs the imposition of liability for sales and use tax where there is a sale of a business:

> If any dealer liable for any tax, interest, or penalty hereunder shall sell out his business or stock of goods, he shall make a final return and payment within 15 days after the date of selling the business; his successor, successors, or assigns shall withhold a sufficient portion of the purchase money to safely cover the amount of such

> taxes, interest, and penalties due and unpaid until such former owner shall produce a receipt from the department showing that they have been paid or a certificate stating that no taxes, interest or penalty are due. If the purchasers of a business or stock of goods shall fail to withhold a sufficient amount of the purchase money as above provided, he shall be personally liable for the payment of the taxes, interest and penalties accruing and unpaid on the account of the operation of the business by any former owner, owners or assigns.

46. Pursuant to Section 212.10(1), Florida Statutes, the liability for any outstanding sales tax liability is placed on both the seller and buyer where a business is sold.

47. Rule 12A-1.055, Florida Administrative Code, provides guidance governing the sales tax consequences of the sale of a business.

48. Significantly, Rule 12A-1.055(3)(c)2., Florida Administrative Code, provides the following:

> (c) A business is deemed not to have been "sold out" when:
>
> * * *
>
> 2. Real or tangible property of a business is transferred by foreclosure . . . .

49. The evidence in this case proved that the transfer of Sheraton Associates' assets was by foreclosure. Pursuant to the language of Rule 12A-1.055(3)(c)2., Florida Administrative Code, quoted in paragraph 48, the foreclosure of Sheraton Associates business is specifically excluded from being treated as a "sale" pursuant to Section 212.10(1), Florida Statutes. Therefore, any liability for sales tax during the audit period prior to the foreclosure by the RTC is the responsibility of Sheraton Associates and there is no authority for the Department to seek payment of any part of that liability from the RTC.

50. Rule 12A-1.055(3)(c)2., Florida Administrative Code, is consistent with the court's interpretation of Section 212.10(1), Florida Statutes, in State of Florida ex rel., Sir Richards, Inc. v. Lewis, 9 Fla. Supp. 2d 68 (Leon Cir. Ct. 1984).

51. Sheraton Associates has relied on the definition of "sale" found in Section 212.02(16), Florida Statutes, in support of its argument that it sold out its business to the RTC. Sheraton Associates' reliance on this provision is misplaced. Section 212.02(16), Florida Statutes, only defines the term "sale" for purposes of determining whether that has been a sale of tangible personal property for purposes of Chapter 212, Florida Statutes. It is not intended to apply to the sales of businesses which is governed by the more specific provisions of Section 212.10(1), Florida Statutes. Sheraton Associates' argument also ignores the clear pronouncement of Rule 12A-1.055(3)(c)2., Florida Administrative Code.

52. Sheraton Associates has also cited Jacobs v. Kirk, 223 So. 2d 795 (Fla. 4th DCA 1969), in support of its position. The facts in that case are distinguishable from the facts in this case.

53. It is concluded that there has been no sell off of the business of Sheraton Associates pursuant to Section 212.10(1), Florida Statutes. Therefore, Sheraton Associates is liable for any sale tax liability prior to February 14, 1991.

D. Does the Doctrine of Equitable Estoppel Apply.

54. Sheraton Associates has argued that, if Section 212.10(1), Florida Statutes, does not apply to this matter, the Department is estopped from collecting any sales tax liability from it.

55. In order to establish that the doctrine of equitable estoppel applies, Sheraton Associates was required to prove the following factors:

> a. There was a representation of a material fact by the Department that is contrary to a later-asserted position of the Department;
> b. Sheraton Associates reasonably relied upon the earlier representation; and
> c. The Department's change in position was detrimental to Sheraton Associates.

See Department of Revenue v. Anderson, 403 So.2d 397 (Fla. 1981); and Kuge v. Department of Administration, Division of Retirement, 449 So.2d 389 (Fla. 3d DCA 1984).

56. The Department does not dispute that its employee, Mr. Estey, misinformed Sheraton Associates. Nor does the evidence support a finding that the Sheraton Associates was not misinformed. The evidence proved that Sheraton Associates was mistakenly told that another entity was liable for the sales taxes at issue. See Hardy, Hardy & Associates, Inc. v. Department of Revenue, 308 So.2d 187 (Fla. 1st DCA 1975).

57. While there was a misrepresentation to Sheraton Associates by the Department, Sheraton Associates failed to prove that it reasonably relied on the misrepresentation or that it suffered any detrimental reliance.

58. Sheraton Associates should not have relied upon Mr. Estey's letter to take no action to contest the proposed assessment of tax contained in the Notice of Intent provided to it on August 30, 1991 as long as that Notice of Intent was still outstanding and unamended. Sheraton Associates knew, or should have known, the consequences of not challenging the Notice of Intent. Its accountant evidenced his understanding of the impact of the Notice of Intent when he requested an extension of time on September 27, 1991, to respond to the Notice of Intent. Had it been reasonable to rely on the letter from Mr. Estey and ignore the Notice of Intent, there would have been no need to request an extension of time to reply to the Notice.

59. Even if Sheraton Associates had been reasonable in relying on Mr. Estey's letter while ignoring the position taken by the Department in the Notice of Intent, it failed to prove it suffered any detriment. Even after the Department notified Sheraton Associates that Mr. Estey's letter was incorrect, Sheraton Associates had the opportunity to challenge the Department's proposed assessment. It chose not to do so. While the destruction of its records may have made it difficult, or even impossible, to contest the assessment, Sheraton Associates failed to prove when the records were disposed of or that the

destructions of the records was reasonable. Additionally, the destruction of the records was contrary to the requirements of the Department's rules. See Rule 12A-1.055(5)(a) and Rule 12A-1.093, Florida Administrative Code.

60. Based upon the foregoing, it is concluded that Sheraton Associates has failed to prove that the doctrine of equitable estoppel applies in this case.

RECOMMENDATION

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

RECOMMENDED that a final order be entered by the Department of Revenue sustaining its August 30, 1991 assessment of additional sales tax, plus penalties and interest, and local government infrastructure surtax, plus penalties and interest.

DONE AND ENTERED this 3rd day of March, 1995, in Tallahassee Florida.

____

LARRY J. SARTIN
Hearing Officer
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Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of March, 1995.

APPENDIX

The parties have submitted proposed findings of fact. It has been noted below which proposed findings of fact have been generally accepted and the paragraph number(s) in the Recommended Order where they have been accepted, if any. Those proposed findings of fact which have been rejected and the reason for their rejection have also been noted.

Sheraton Associates' Proposed Findings of Fact

1 Accepted in 1.
2 Accepted in 2 and hereby accepted.
3 Accepted in 4.
4 Accepted in 35.
5 Accepted in 1.
6 Accepted in 7.
7 Accepted in 9-10 and 12-13.
8 Accepted in 13.
9 Accepted in 13 and 15.
10 Accepted in 22.
11 Accepted in 33.
12 Accepted in 34.
13 Accepted in 35.
14 Hereby accepted.

15 Accepted in 25.
16 Hereby accepted.
17 Not supported by the weight of the evidence. See 18-20.
18 Accepted in 26.
19 Not supported by the weight of the evidence. See 36-41.
20 Not relevant.
21 Not supported by the weight of the evidence.

The Department's Proposed Findings of Fact

1 Accepted in 1.
2 Accepted in 3 and hereby accepted.
3 Accepted in 4.
4 Accepted in 35.
5 Accepted in 1.
6 Accepted in 7.
7 Accepted in 9-10 and 12-13.
8 Accepted in 13.
9 Accepted in 13 and 15.
10 Accepted in 22.
11 Accepted in 33.
12 Accepted in 34.
13 Accepted in 35.
14 Hereby accepted.
15 Accepted in 5.
16 Accepted in 7.
17 Accepted in 2.
18 Accepted in 8-9.
19 Accepted in 15-16.
20 See 18-20.
21 Accepted in 21.
22 Accepted in 22 and hereby accepted.
23 Hereby accepted.
24 Accepted in 22-23.
25 Accepted in 23.
26 Accepted in 19-20.
27 Accepted in 24.
28 Accepted in 25.
29 Accepted in 28.
30 Cumulative. Not relevant.
31 Accepted in 29.
32 Accepted in 30
33 Accepted in 31.
34 Accepted in 32.
35-36 Hereby accepted.
37 Accepted in 6.
38 Accepted in 8.
39 Accepted in 11.
40 Accepted in 10-13.
41 Hereby accepted.
42 Accepted in 9.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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