STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TAN, INC., and LINDA A. W. MESA,	)	
	)	
Petitioners,	)	
	)	
vs.	)	CASE NO. 94-2135
	)	
DEPARTMENT OF REVENUE,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was conducted by video teleconference in this case on April 18, 1995, in West Palm Beach and Tallahassee, Florida, before Stuart M. Lerner, a duly designated Hearing Officer of the Division of Administrative Hearings.

APPEARANCES

For Petitioners: Linda A. W. Mesa
99 South Sewall's Point Road
Stuart, Florida 34996

For Respondent: Lealand L. McCharen, Esquire
Office of the Attorney General
The Capitol, Tax Section
Tallahassee, Florida 32399-1050

STATEMENT OF THE ISSUE

Whether the contested and unpaid portions of the tax, penalty and interest assessment issued against Petitioners as a result of Audit No. 9317210175 should be withdrawn as Petitioners have requested?

PRELIMINARY STATEMENT

By letter dated December 22, 1993, Respondent gave written notice (hereinafter referred to as the "Notice of Proposed Assessment") of its intention to impose an assessment against Petitioners and Robert M. Woods, Jr., in the amount of $340,580.74 for taxes allegedly owed (as well as penalties and interest, as of December 7, 1993) in connection with certain business activities that took place at the Shuckers Too restaurant and lounge (hereinafter referred to as "Shuckers") in Jensen Beach, Florida during the six year period from June 1, 1987, to May 31, 1993 (hereinafter referred to as the "audit period"). On or about April 19, 1994, Petitioners, who at the time were represented by counsel, filed with Respondent a petition requesting a formal administrative hearing on the matter.

In their petition, Petitioners argued that the assessment against them should be reversed in full, except for that amount (approximately $1,260.00,

including estimated penalty and interest) 1/ which Petitioner TAN, Inc., conceded it owed for rental payments of approximately $15,000.00 covering the period from December 3, 1992, to May 31, 1993.

The petition contained the following "Statement of Disputed Issues of Material Fact:"

> PETITIONERS dispute the following issues of material fact:
>
> A. General, Audit-Wide Facts. PETITIONER TAN disputes that it operated any business or conducted any taxable transactions during the Audit Period other than during the period 12/03/92 - 5/31/93. PETITIONER TAN for all items disputes that it is responsible for any transactions before 12/03/92. PETITIONER MESA disputes that she is or has ever been a dealer, and disputes that she is responsible individually for any of the transactions in the Notice of Proposed Assessment. Furthermore, for any business operations conducted by PETITIONER TAN during 12/03/92 - 05/31/93, PETITIONER TAN disputes the use of any sampling techniques that are not authorized and that are not calculated for the 12/03/92 - 05/31/93 period, and which are not statistically sound. Petitioner MESA also disputes the use of any sampling techniques against her, as she disputes that she was a dealer at any time during the Notice of Proposed Assessment period. Further, each of the various subschedules comprising the amounts assessed in the Notice of Proposed Assessment were calculated using an "Effective Rate," which is not authorized by Florida Statutes and was improperly calculated by the Auditor. PETITIONER TAN disputes the use of any Effective Rates for any of the transactions occurring during 12/03/92 - 05/31/93. PETITIONER MESA disputes that she is a dealer, that she is required to collect and remit sales tax to the RESPONDENT, and therefore she disputes the use of any Effective Rate as applied to her.
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> All of the above statements of disputed items are General and apply Audit-wide to the items following.
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> B. Cash Register Receipts. PETITIONER TAN disputes that the amounts reported on its DR-15 are incorrect, and disputes that its records are inadequate and unreliable for review of tax liability. PETITIONER MESA disputes that she is a dealer, and that she is required to collect and remit sales tax to RESPONDENT.
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> C. Tax Collection Rate. PETITIONERS dispute the Auditor's use of unauthorized and erroneously calculated "Effective Rates."

D. Sunday Brunch Sales. PETITIONER TAN disputes that it did not collect or remit sales tax due, if any, on Sunday Brunch Sales. PETITIONER MESA disputes that she is a dealer and that she is required to collect and remit sales tax to RESPONDENT.

E. Cigarette Vending Sales. PETITIONERS dispute that they are "operators" who received any receipts from Cigarette Vending sales.

F. Disallowed Exempt Sales. PETITIONER TAN disputes that it is liable for any Disallowed Exempt Sales occurring prior to 12/03/92. PETITIONER MESA disputes that she is a dealer and that she is required to collect and remit sales tax to RESPONDENT.

G. Unreported Vending Machine Location Rental Sales. PETITIONERS dispute that they are the location owners who rented any vending machine location and dispute that they are required to collect and remit sales tax to RESPONDENT.

H. Tiki Bar Sales. PETITIONER TAN disputes that it did not collect and remit sales taxes due, if any, on Tiki Bar Sales. PETITIONER MESA disputes that she is a dealer and that she is required to collect and remit sales tax to RESPONDENT.

I. Tee Shirt Sales. PETITIONERS dispute that they have collected any receipts from Tee shirt sales and that they are liable for any sales tax thereon. PETITIONER MESA disputes that she is a dealer and that she is required to collect and remit sales tax to RESPONDENT.

J. Cash Register Receipts- NAT. PETITIONER TAN disputes that it is responsible for any transactions prior to 12/03/92. PETITIONER MESA disputes that she is a dealer and that she is required to collect and remit sales tax to RESPONDENT.

K. Purchases- Commercial Rent. PETITIONER TAN disputes that it rented the premises prior to 12/03/92 and that it is liable for any sales tax thereon. PETITIONER MESA disputes that she rented the premises at any time and that she is liable for any sales tax thereon.

Petitioners further alleged in their petition, among other things, the following:

A. GENERAL ISSUES RELATING TO THE ENTIRE AUDIT

(1) Facts: PETITIONER TAN states that it began its business operations on or about the date of its incorporation, 12/03/92, continuing through the end of the Audit period of 05/31/93.

PETITIONER TAN did not buy a business from anyone. PETITIONER TAN is not a successor to and is not liable for transactions occurring before 12/03/92. PETITIONER MESA never operated any business individually, and is not responsible for any of the transactions that occurred during the Audit Period. PETITIONER MESA did not direct any corporate employees to fail to collect, truthfully account for and pay over any tax due.

PETITIONER TAN has adequate records that are not voluminous to show that it collected and remitted sales tax payable at the statutory rate of 6 percent, and PETITIONER TAN objects to the use of any sampling techniques or Effective Rates in this Audit.

(2) Statutes, Rules:

(a) There was no sale of a business to Petitioner TAN or PETITIONER MESA, therefore, Florida Statutes Section 212.10 and Florida Administrative Code Rule ("Rule") 12A-1.055 do not apply, as such law governs liability of either a seller or a buyer. PETITIONER TAN is not liable for any activity prior to 12/03/92, and PETITIONER MESA is not liable for any activity during the Audit Period.

(b) Florida Statutes 212.05 and Rule 12A-1.056(13) govern the taxability of "every person . . . who engages in the business of selling tangible personal property at retail . . ." That "person" is PETITIONER TAN for activities occurring during the period 12/03/92 - 05/31/93, and is not PETITIONER MESA, as she was not in such business individually.

(c) Florida Statute Section 212.12 (5),(6) provides for the use of estimates, but only where the taxpayer "fails or refuses" to make records available; further, the Auditor is required to "statistically sample" such records, and may not make unsubstantiated, unsound estimates that are not statistically reliable. PETITIONER TAN has adequate and not voluminous records available. Furthermore, the samples used by the Auditor that affect the period 12/03/92 - 05/31/93 are not statistically sound, and are not reliable for that period.

(3) Relief Requested. The Assessment should be reversed against PETITIONER TAN, as it properly collected and remitted sales tax to the RESPONDENT, and against PETITIONER MESA, as she is not and has never been a dealer, and she is not required to collect and remit sales tax to Respondent.

On April 25, 1994, the matter was referred to the Division of Administrative Hearings for the assignment of a Hearing Officer to conduct the formal administrative hearing Petitioners had requested. In their response to the Initial Order issued by the Division, the parties stated that "[d]ue to existing trial schedules and prior commitments of counsel, [they could] not be ready for final hearing prior to October 14, 1994." To accommodate the parties'

schedules, the final hearing was originally scheduled to commence on October 20, 1994. By order issued October 12, 1994, at the parties' joint request, the final hearing was continued and rescheduled to commence on January 26, 1995. The day before the hearing was scheduled to commence, counsel for Petitioners filed a motion requesting: 1) leave to withdraw as Petitioners' counsel of record in this case; and 2) a continuance of the hearing. The motion was granted and the hearing was rescheduled for April 18, 1995.

On April 11, 1995, the parties filed their Prehearing Stipulation. In their Prehearing Stipulation, they described the nature of the controversy and their respective positions as follows:

> (a) The nature of the controversy in this case is whether Petitioners are liable for tax assessed on prior occupants of the restaurant in question under Section 212.10, Fla. Stat. and whether Petitioners are liable for tax assessed during the time of Petitioners' activities in the same restaurant.
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> (b) Petitioners' Position
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> Petitioners are not liable for taxes assessed against any prior occupants or owners of the restaurant because Petitioners did not purchase the business or any part of its stock of goods. Further, Petitioners did not lease the restaurant in question. Petitioners are likewise not liable for taxes assessed for the period of Petitioners' presence in the restaurant because Petitioners were only managing the restaurant for the owners.
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> Respondent's Position
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> Petitioners are liable for tax assessed on prior occupants of the restaurant because Petitioners occupied the restaurant, filed tax returns under the prior occupant's sales tax number, and showed overall control of the business operations. Further, Petitioners did occupy the restaurant and filed tax returns under their own number. These factors show Petitioners' liability under Section 212.10, Fla. Stat. and liability for Petitioners' own operation of the business.

To the extent that Petitioners' position, as stated in the parties' Prehearing Stipulation, regarding the unpaid portions of the assessment at issue in the instant case, is at odds with any statements made in Petitioners' petition, the filing of the Prehearing Stipulation served to amend the petition and alter the issues to be litigated at hearing. See Lotspeich Company v. Neogard, 416 So.2d 1163, 1165 (Fla. 3d DCA 1982)("[p]retrial stipulations prescribing the issues on which a case is to be tried are binding upon the parties and the court, and should be strictly enforced"); Provident National Bank v. Thunderbird Associates, 364 So.2d 790, 794 (Fla. 1st DCA 1978)(issues are fixed by the pleadings, but may be changed by stipulation of the parties).

At the final hearing, which was held as scheduled on April 18, 1995, Petitioners and Respondent each presented the testimony of one witness. Petitioner Mesa testified for Petitioners. Eva Daniel, who conducted the audit that led to the assessment that is the subject of the instant case, testified for Respondent. In addition to the testimony of these two witnesses, a total of 14 exhibits (Petitioner's Exhibits 1 through 7 and Respondent's Exhibits 1 through 7) were offered and received into evidence.

At the close of the evidentiary portion of the hearing, 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 May 4, 1995. On June 6, 1995, the parties filed a motion jointly requesting an extension of the deadline for filing post-hearing submittals. By order issued June 7, 1995, the Hearing Officer granted the motion and extended the deadline to June 12, 1995.

Respondent and Petitioners filed proposed recommended orders on June 12, 1995, and June 16, 1995. 2/ These proposed recommended orders contain, what are labelled as, "findings of fact." These "findings of fact" are specifically addressed in the Appendix to this Recommended Order.

FINDINGS OF FACT

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

1. Shuckers is an oceanfront restaurant and lounge located at 9800 South Ocean Drive in Jensen Beach, Florida.

2. In November of 1992, Petitioner Mesa's brother, Robert Woods, Jr., telephoned Mesa and asked her if she wanted a job as Shuckers' bookkeeper.

3. Woods had been the owner of Shuckers since 1986 through his ownership and control of the corporate entities (initially Shuckers Oyster Bar Too of Jensen Beach, Florida, Inc., and then NAT, Inc.) that owned the business.

4. Mesa needed a job. She therefore accepted her brother's offer of employment, notwithstanding that she had no previous experience or training as a bookkeeper.

5. When Mesa reported for her first day of work on November 19, 1992, she learned that Woods expected her to be not only the bookkeeper, but the general manager of the business as well.

6. Mesa agreed to perform these additional responsibilities.

7. She managed the day-to-day activities of the business under the general direction and supervision of Woods.

8. After a couple of weeks, Woods told Mesa that it would be best if she discharged her managerial responsibilities through an incorporated management company.

9. Woods had his accountant draft the documents necessary to form such a corporation.

10. Among these documents were the corporation's Articles of Incorporation. Mesa executed the Articles of Incorporation and, on December 3, 1992, filed them with the Secretary of State of the State of Florida, thereby creating Petitioner TAN, Inc.

11. TAN, Inc.'s Articles of Incorporation provided as follows:

> The undersigned subscribers to these Articles of Incorporation, natural persons competent to contract, hereby form a corporation under the laws of the State of Florida.
>
> ARTICLE I- CORPORATE NAME
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> The name of the corporation is:
>
> TAN, INC.
>
> ARTICLE II- DURATION
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> This corporation shall exist perpetually unless dissolved according to Florida law.
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> ARTICLE III- PURPOSE
>
> The corporation is organized for the purpose of engaging in any activities or business permitted under the laws of the United States and the State of Florida.
>
> ARTICLE IV- CAPITAL STOCK
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> The corporation is authorized to issue One Thousand (1000) shares of One Dollar ($1.00) par value Common Stock, which shall be designated "Common Shares."
>
> Article V- INITIAL REGISTERED OFFICE AND AGENT
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> The principal office, if known, or the mailing address of this corporation is:
>
> TAN, INC.
> 9800 South Ocean Drive
> Jensen Beach, Florida 34957
>
> The name and address of the Initial Registered Agent of the Corporation is:
>
> Linda A. W. Mesa
> 9800 South Ocean Drive
> Jensen Beach, Florida 34957

ARTICLE VI- INITIAL BOARD OF DIRECTORS

This corporation shall have one (1) director initially. The number of directors may be either increased or diminished from time to time by the By-laws, but shall never be less than one (1). The names and addresses of the initial directors of the corporation are as follows:

Linda A. W. Mesa
9800 South Ocean Drive
Jensen Beach, Florida 34957

ARTICLE VII- INCORPORATORS

The names and addresses of the incorporators signing these Articles of Incorporation are as follows:

Linda A. W. Mesa
9800 South Ocean Drive
Jensen Beach, Florida 34957

12. On the same day it was incorporated, December 3, 1992, TAN, Inc., entered into the following lease agreement with the trust (of which Woods was the sole beneficiary) that owned the premises where Shuckers was located:

I, Michael Blake, Trustee, hereby lease to Tan, Inc. the premises known as C-1, C-2, C-3, C-4, 9800 South Ocean Drive, Jensen Beach, Florida for the sum of $3,000.00 per month.

This is a month to month lease with Illinois Land Trust and Michael Blake, Trustee.

Mesa signed the agreement in her capacity as TAN, Inc.'s President. She did so at Woods' direction and on his behalf.

13. No lease payments were ever made under the agreement. 3/

14. The execution of the lease agreement had no impact upon Shuckers.

15. Woods remained its owner and the person who maintained ultimate control over its operations.

16. At no time did he relinquish any part of his ownership interest in the business to either Mesa or her management company, TAN, Inc.

17. Mesa worked approximately 70 to 80 hours a week for her brother at Shuckers doing what he told her to do, in return for which she received a modest paycheck. Woods frequently subjected his sister to verbal abuse, but Mesa nonetheless continued working for him and following his directions because she needed the income the job provided.

18. As part of her duties, Mesa maintained the business' financial records and paid its bills.

19. She was also required to fill out, sign and submit to Respondent the business' monthly sales and use tax returns (hereinafter referred to as "DR-15s"). She performed this task to the best of her ability without any intention to defraud or deceive Respondent regarding the business' tax liability.

20. The DR-15s she prepared during the audit period bore NAT, Inc.'s Florida sales and use tax registration number.

21. On the DR-15 for the month of December, 1992, Mesa signed her name on both the "dealer" and "preparer" signature lines.

22. Other DR-15s were co-signed by Mesa and Woods.

23. In April of 1993, Woods told Mesa that she needed to obtain a Florida sales and use tax registration number for TAN, Inc., to use instead of NAT, Inc.'s registration number on Shuckers' DR-15s.

24. In accordance with her brother's desires, Mesa, on or about May 14, 1993, filed an application for a Florida sales and use tax registration number for TAN, Inc., which was subsequently granted.

25. On the application form, Mesa indicated that TAN, Inc. was the "owner" of Shuckers and that the application was being filed because of a "change of ownership" of the business. In fact, TAN, Inc. was not the "owner" of the business and there had been no such "change of ownership."

26. By letter dated June 22, 1993, addressed to "TAN INC d/b/a Shuckers," Respondent gave notice of its intention to audit the "books and records" of the business to determine if there had been any underpayment of sales and use taxes during the five year period commencing June 1, 1988, and ending May 31, 1993.

27. The audit period was subsequently extended to cover the six year period from June 1, 1987 to May 31, 1993.

28. Relying in part on estimates because of the business' inadequate records, auditors discovered that there had been a substantial underpayment of sales and use taxes during the audit period.

29. The auditors were provided with complete cash register tapes for only the following months of the audit period: June, July, August and December of 1992, and January, February, March, April and May of 1993. A comparison of these tapes with the DR-15s submitted for June, July, August and December of 1992, and January, February, March, April and May of 1993 revealed that there had been an underreporting of sales for these months.

30. Using the information that they had obtained regarding the three pre-December, 1992, months of the audit period for which they had complete cash register tapes (June, July and August of 1992), the auditors arrived at an estimate of the amount of sales that had been underreported for the pre-December, 1992, months of the audit period for which they did not have complete cash register tapes.

31. The auditors also determined that Shuckers' tee-shirt and souvenir sales, 4/ Sunday brunch sales, cigarette vending sales, vending/amusement machine location rentals 5/ and tiki bar sales that should have been included in the sales reported on the DR-15s submitted during the audit period were not included in these figures nor were these sales reflected on the cash register

tapes that were examined. According of the "Statement of Fact" prepared by the auditors, the amount of these unreported sales were determined as follows:

> TEE-SHIRT SALES: Sales were determined by estimate. This was determined to be $2,000/ month. No records were available and no tax remitted through May, 1993.
>
> SUNDAY BRUNCH SALES: Sales were determined by estimate. This was determined to be 100 customers per brunch per month (4.333 weeks). No audit trail to the sales journal was found and no records were available.
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> CIGARETTE VENDING SALES: The estimate is based on a review of a sample of purchases for the 11 available weeks. The eleven weeks were averaged to determine monthly sales at $3/pack.
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> VENDING MACHINE LOCATION RENTAL REVENUE: The revenue estimate is based on a review of a one month sample.
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> TIKI BAR SALES: The sales estimate is based on a review of infrequent cash register tapes of February, 1993. The daily sales was determined by an average of the sample. The number of days of operation per month was determined by estimate.

32. In addition, the auditors determined that TAN, Inc. had not paid any tax on the lease payments it was obligated to make under its lease agreement with Illinois Land Trust and Michael Blake, Trustee, nor had any tax been paid on any of the pre-December, 1992, lease payments that had been made in connection with the business during the audit period. According to the "Statement of Fact" prepared by the auditors, the amount of these lease payments were determined as follows:

> The estimate is based on 1990 1120 Corporate return deduction claimed. This return is on file in the Florida CIT computer database. The 1990 amount was extended through the 6/87 - 11/92 period. For the period 12/92 - 5/93 audit period, TAN's current lease agreement of $3,000/month was the basis.

33. No documentation was produced during the audit supporting any the sales tax exemptions that the business had claimed during the audit period on its DR-15s. 6/ Accordingly, the auditors concluded that the sales reported as exempt on the business' DR-15s were in fact taxable.

34. Using records of sales made on a date selected at random (February 1, 1993), the auditors calculated effective tax rates for the audit period. They then used these effective tax rates to determine the total amount of tax due.

35. An initial determination was made that a total of $201,971.71 in taxes (not including penalties and interest) was due. The amount was subsequently lowered to $200,882.28.

36. On or about December 22, 1993, TAN, Inc., entered into the following Termination of Lease Agreement with Ocean Enterprises, Inc.:

> TAN, Inc., a Florida corporation, hereby consents to termination of that certain lease of the premises known as C-1, C-2, C-3 and C-4 of ISLAND BEACH CLUB, located at 9800 South Ocean Drive, Jensen Beach, Florida, dated December 3, 1992, acknowledges a landlord's lien on all assets for unpaid rent; and transfers and sets over and assigns possession of the aforesaid units and all of its right, title and interest in and to all inventory, equipment, stock and supplies located on said premises 7/ in full satisfaction of said unpaid rent; all of the foregoing effective as of this 22nd day of December, 1993.
>
> FOR AND IN CONSIDERATION of the foregoing termination of lease, OCEAN ENTERPRISES, Inc., a Florida corporation, hereby agrees to pay Linda Mesa, each month all of the net revenues of the operation of the bar and restaurant located on said premises, up to the sum of $15,000.00, for sales tax liability asserted against TAN, Inc. or Linda A. W. Mesa based upon possession or ownership of said premises or any of the assets located thereon, plus attorney's fees incurred in connection with defending or negotiating settlement of any such liability. Net revenue shall mean gross revenue, less operating expenses, including, but not limited to, rent, up to the amount of $5,000.00 per month, costs of goods sold, utilities, payroll and payroll expense and insurance.
>
> OCEAN ENTERPRISES, Inc. represents that it has entered into a lease of said premises for a term of five years commencing on or about December 22, 1993, pursuant to the terms and conditions of which OCEANFRONT [sic] ENTERPRISES, Inc. was granted the right to operate a restaurant and bar business on said premises.

37. Ocean Enterprises, Inc., leases the property from Island Beach Enterprises, which obtained the property through foreclosure.

38. TAN, Inc., has been administratively dissolved.

CONCLUSIONS OF LAW

39. Payments made by a tenant for the lease of real property are taxable under Chapter 212, Florida Statutes, which is known as the "Florida Revenue Act of 1949" (hereinafter referred to as the "Act"). Section 212.031(1)(a), Fla. Stat. The tenant is responsible for paying the tax on these lease payments. Section 212.031(2)(a), Fla. Stat.

40. The rental or sale at retail of tangible personal property is also taxable under the Act. Section 212.05, Fla. Stat.

41. The "dealer" making the sale is responsible for collecting the sales tax from the purchaser at the time of sale. Sections 212.06(3) and 212.07(1), Fla. Stat.

42. A "dealer who neglects, fails, or refuses to collect the [sales] tax . . . upon any, every, and all retail sales made by him or his agents or employees of tangible personal property . . . subject to the tax imposed by th[e Act is] liable for and [must] pay the tax himself." Section 212.07(2), Fla. Stat.

43. The term "dealer," as used in the Act is defined in Section 212.06(2), Florida Statutes, as follows:

> (a) The term "dealer," as used in this chapter, includes every person who manufactures or produces tangible personal property for sale at retail; for use, consumption, or distribution; or for storage to be used or consumed in this state.
>
> (b) The term "dealer" is further defined to mean every person, as used in this chapter, who imports, or causes to be imported, tangible personal property from any state or foreign country for sale at retail; for use, consumption, or distribution; or for storage to be used or consumed in this state.
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> (c) The term "dealer" is further defined to mean every person, as used in this chapter, who sells at retail or who offers for sale at retail, or who has in his possession for sale at retail; or for use, consumption, or distribution; or for storage to be used or consumed in this state, tangible personal property as defined herein, including a retailer who transacts a mail order sale.
>
> (d) The term "dealer" is further defined to mean any person who has sold at retail; or used, or consumed, or distributed; or stored for use or consumption in this state, tangible personal property and who cannot prove that the tax levied by this chapter has been paid on the sale at retail, the use, the consumption, the distribution, or the storage of such tangible personal property. However, the term "dealer" does not mean a person who is not a "dealer" under the definition of any other paragraph of this subsection and whose only owned or leased property (including property owned or leased by an affiliate) in this state is located at the premises of a printer with which it has contracted for printing, if such property consists of the final printed product, property which becomes a part of the final printed product, or property from which the printed product is produced.
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> (e) The term "dealer" is further defined to mean any person, as used in this chapter, who leases or rents tangible personal property, as defined in this chapter, for a consideration, permitting the use or possession of such property without transferring title thereto, except as expressly provided for to

the contrary herein.

(f) The term "dealer" is further defined to mean any person, as used in this chapter, who maintains or has within this state, directly or by a subsidiary, an office, distributing house, salesroom, or house, warehouse, or other place of business.

(g) "Dealer" also means and includes every person who solicits business either by direct representatives, indirect representatives, or manufacturers' agents; by distribution of catalogs or other advertising matter; or by any other means whatsoever, and by reason thereof receives orders for tangible personal property from consumers for use, consumption, distribution, and storage for use or consumption in the state; such dealer shall collect the tax imposed by this chapter from the purchaser, and no action, either in law or in equity, on a sale or transaction as provided by the terms of this chapter may be had in this state by any such dealer unless it is affirmatively shown that the provisions of this chapter have been fully complied with.

(h) "Dealer" also means and includes every person who, as a representative, agent, or solicitor of an out-of-state principal or principals, solicits, receives, and accepts orders from consumers in the state for future delivery and whose principal refuses to register as a dealer. 8/

(i) "Dealer" also means and includes the state, county, municipality, any political subdivision, agency, bureau or department, or other state or local governmental instrumentality.

(j) The term "dealer" is further defined to mean any person who leases, or grants a license to use, occupy, or enter upon, living quarters, sleeping or housekeeping accommodations in hotels, apartment houses, roominghouses, tourist or trailer camps, real property, space or spaces in parking lots or garages for motor vehicles, docking or storage space or spaces for boats in boat docks or marinas, or tie-down or storage space or spaces for aircraft at airports. The term "dealer" also means any person who has leased, occupied, or used or was entitled to use any living quarters, sleeping or housekeeping accommodations in hotels, apartment houses, roominghouses, tourist or trailer camps, real property, space or spaces in parking lots or garages for motor vehicles or docking or storage space or spaces for boats in boat docks or marinas, or who has purchased communication services or electric power or energy, and who cannot prove that the tax levied by this chapter has been paid to the vendor or lessor on any such transactions.

(k) "Dealer" also means any person who sells, provides, or performs a service taxable under this part. "Dealer" also means any person who purchases, uses, or consumes a service taxable under this part who cannot prove that the tax

> levied by this part has been paid to the seller of the taxable service.
>
> (l) "Dealer" also means any person who solicits, offers, provides, enters into, issues, or delivers any service warranty taxable under this part, or who receives, on behalf of such a person, any consideration from a service warranty holder.

44. Respondent is authorized to inspect, examine and audit the accounts, books and other records of "dealers" and to "make assessment of any deficiency in tax, penalty, or interest determined to be due." Sections 212.12 and 213.34, Fla. Stat.

45. Respondent may make such an assessment "from an estimate based upon the best information then available to it," if the "dealer" "fails or refuses to make his records available for inspection." Section 212.12(5)(b), Fla. Stat.

46. "[I]f a dealer does not have adequate records of his retail sales or purchases, [Respondent] may, upon the basis of a test or sampling of the dealer's available records or other information relating to the sales or purchases made by such dealer for a representative period, determine the proportion that taxable retail sales bear to total purchases." Section 212.12(6)(b), Fla. Stat.

47. "If the records of a dealer are adequate but voluminous in nature and substance, [Respondent] may statistically sample such records, except for fixed assets, and project the audit findings derived therefrom over the entire audit period to determine the proportion that taxable retail sales bear to total retail sales or the proportion that taxable purchases bear to total purchases." Section 212.12(6)(c), Fla. Stat.

48. If a "dealer" liable for any tax, interest or penalty "sell[s] out his business or stock of goods," the purchaser may assume the dealer's liability pursuant to Section 212.10(1), Florida Statutes, which provides as follows:

> If any dealer liable for any tax, interest, or penalty levied 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 account of such taxes, interest, or 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 account of the operation of the business by any former owner, owners, or assigns. Any receipt or certificate from the department does not, without an audit of the selling dealer's books and records by the department, guarantee that there is not a tax

deficiency owed the state from operation of the seller's business. To secure protection from transferee liability under this section, the seller or purchaser may request an audit of the seller's books and records. The department may contract with private auditors pursuant to s. 213.28 to perform the audit. The department may charge the cost of the audit to the person requesting the audit.

49. According to Rule 12A-1.055(3), Florida Administrative Code:

(a) A business is deemed to have been "sold out" when:

1. The dealer for consideration transfers, to the extent that the transferring dealer no longer continues in that business, to another, its stock of goods or other component parts of the business . . . .

2. A part owner of a business, such as a partner or member of a joint adventure, sells his interest in the business to another, and the legal effect of doing so, under the law applicable to the facts, is to terminate the former partnership or joint adventure and to begin a new one, with the result that all members of the new arrangement are obligated for Chapter 212, F.S., taxes, interest and penalties that accrued under the former arrangement.

3. A tenant abandons his business owing his landlord rent and the landlord, acting under an abandonment clause in the lease, takes ownership of tangible personal property left on the premises by the tenant.

(b) A business will be deemed to have been "sold out" when a business previously operated under one type of organization is transferred for consideration to another type of organization, such as from a sole proprietorship to a corporation, from a partnership to a corporation; or when there is a corporate reorganization as a result of which the business is owned by a corporation other than the corporation that previously owned it; or when ownership of a business is transferred from a subsidiary to a parent corporation or to another subsidiary of the parent, or from a parent to a subsidiary.

(c) A business is deemed not to have been "sold out" when:

1. A part owner of a business, such as a partner or member of a joint adventure, sells his interest in the business to another and the legal effect of doing so, under the law applicable to the facts, is not to terminate the former partnership or joint adventure and to begin a new one, with the result that while the new partner may assume responsibility for tax and other obligations of the business that accrued before the purchase of the interest in the business, the new partner will not be responsible for preexisting tax obligations on account of a

selling out of a business.
2. Real or tangible personal property of a business is transferred by foreclosure;
3. There is a change in ownership of stock in a corporation that owns a business; or
4. Parts of its assets are sold to various purchasers, without the purchase of a major portion of the assets of the business by one purchaser or a group of purchasers acting in concert.
(d)1. A "stock of goods" for purposes of this rule is synonymous with "inventory." A stock of goods is demed to have been "sold out" if an overwhelming preponderance of a dealer's inventory is sold for a consideration, other than in the ordinary course of business, to a purchaser or group of purchasers who are acting in concert, and the former owner of the business is no longer in business.

50. A "dealer" or other person against whom a deficiency assessment is made may administratively challenge the assessment under Chapter 120, Florida Statutes. Section 72.011, Fla. Stat.

51. In such an administrative proceeding, Respondent's burden of proof is "limited to a showing that an assessment has been made against the taxpayer and the factual and legal grounds upon which [Respondent] made the assessment." Section 120.575 (2), Fla. Stat. Upon Respondent making such a showing, the burden shifts to the taxpayer to demonstrate by a preponderance of the evidence that the assessment is incorrect. See Department of Health and Rehabilitative Services v. Career Service Commission, 289 So.2d 412, 415 (Fla. 4th DCA 1974)("'[as a general rule the comparative degree of proof by which a case must be established is the same before an administrative tribunal as in a judicial proceeding- that is, a preponderance of the evidence'").

52. The assessment at issue in the instant case was the product of an audit of Shuckers' business activitiess during the period commencing June 1, 1987, and ending May 31, 1993, which led Respondent to preliminarily determine that Petitioners (along with Woods) should be held liable for the payment of unpaid taxes (plus penalties and interest) that were generated as a result of the operation of the business during the audit period.

53. TAN, Inc., conceded liability with respect to, and paid, that portion of the assessment relating to the payments, totaling approximately $15,000.00, that it had been responsible to make under its lease agreement with Illinois Land Trust and Michael Blake, Trustee, for the period from December 3, 1992, to May 31, 1993. 9/ It administratively challenged the remaining portions of the assessment, however. Mesa did likewise.

54. At hearing, Petitioners presented evidence sufficient to establish that these contested and unpaid portions of the assessment against them should, as they have requested, be withdrawn by Respondent.

55. The preponderance of the evidence adduced at hearing establishes that Petitioners' involvement in Shuckers' business activities was limited to their acting as agents on behalf of the owner of Shuckers during approximately the last six months of the audit period and that at no time did they themselves have any ownership interest in any part of the business, including its stock or inventory, or ultimate control over its operations.

56. Under such circumstances, Petitioners are not liable under the Act, as "dealers" or in any other capacity, for the payment of those unpaid taxes the owner of Shuckers should have collected during the period of Petitioners' involvement (as the owner's agents) in the operations of the business; nor do they have any liability under the Act, as purchasers, transferees, successors or in any other capacity, for the payment of those unpaid taxes that were due and owing at the time their involvement in the business began. 10/

RECOMMENDATION

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

RECOMMENDED that the Department of Revenue enter a final order withdrawing the contested and unpaid portions of the assessment issued as a result of Audit No. 9317210175, as it relates to TAN, Inc., and Linda A. W. Mesa.

DONE AND ENTERED in Tallahassee, Leon County, Florida, this 27th day of June, 1995.

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 27th day of June, 1995.

ENDNOTES

1/ A check in this amount accompanied the petition.

2/ The certificate of service of Petitioners' proposed recommended order reflects that a copy of their proposed recommended order was mailed to counsel for Respondent on June 12, 1995, the same date that, according to the certificate of service of Respondent's proposed recommended order, Respondent mailed a copy of its proposed recommended order to Petitioners.

3/ This finding is based upon testimony given by Mesa at hearing, which the Hearing Officer finds credible notwithstanding that it appears to be inconsistent with the concession made in Petitioners' petition (which Mesa signed, but apparently did not prepare) that TAN, Inc. made lease payments totaling $15,000.00 from December 3, 1992, through May 31, 1993.

4/ These tee-shirts and souvenirs were sold from a kiosk located at the entrance to the restaurant.

5/ The business received 50 percent of the monies collected from these machines.

6/ There were no exemptions claimed either before June of 1988 or after November of 1992.

7/ In fact, TAN, Inc., had no "right, title and interest in and to [any] inventory, equipment, stock [or] supplies on said premises."

8/ This is the only instance under the statute where a representative or agent may be deemed to be a "dealer" based upon conduct in which it engages on behalf of its principal. See Frank J. Rooney v. Leisure Resorts, 624 So.2d 773, 777 (Fla. 4th DCA 1993, rev. granted, 639 So.2d 979 (Fla. 1994)("[w]hen the legislature has carefully employed a term in one section of the statute, but omits it in another section of the same act, it should not be implied where it is excluded;" "[a] court may not, in the process of construction, supply the omission"); St. George Island, LTD., v. Rudd, 547 So.2d 958, 961 (Fla. 1st DCA 1989)("the presence of a term in one portion of a statute and its absence from another argues against reading it as implied by the section from which it is omitted"); Ocasio v. Bureau of Crimes Compensation, 408 So.2d 751, 753 (Fla. 3d DCA 1982)(Legislature's use of different language in different portions of the same statute "is strong evidence that it intended a . . . different meaning"); cf. Johnson v. Fraedrich, 472 So.2d 1266, 1268 (Fla. 1st DCA 1985)("[a]n act done by an agent on behalf of the principal within the scope of the agency is not the act of the agent but of the person by whose direction it is done").

9/ Accordingly, the propriety of this portion of the assessment is not at issue in the instant case.

10/ In applying the applicable provisions of the Act to the facts of the instant case, it must be kept in mind that "[t]ax laws should be construed strongly in favor of the taxpayer and against the government with all ambiguities or doubts resolved in the taxpayer's favor." See Lloyd Enterprises, Inc. v. Department of Revenue, 651 So.2d 735, 739 (Fla. 5th DCA 1995).

APPENDIX TO RECOMMENDED ORDER

The following are the Hearing Officer's specific rulings on the "findings of facts" proposed by the parties:

Petitioners' Proposed Findings

1-3. Accepted and incorporated in substance, although not necessarily repeated verbatim, in this Recommended Order.

4. Rejected as a finding of fact because it is more in the nature of a summary of testimony than a finding of fact.

5-8. Not incorporated in this Recommended Order because it would add only unnecessary detail to the factual findings made by the Hearing Officer.

9. Accepted and incorporated in substance.

10. To the extent that this proposed finding states that "there w[ere] never any moneys paid to the Trust for rent," it has been accepted and incorporated in substance. To the extent that it states that, as a result, "[t]he lease agreement was never activated," it has been rejected as a finding of fact because it is more in the nature of legal argument.

11. Accepted and incorporated in substance.

Respondent's Proposed Findings

1-3. Accepted and incorporated in substance.

4. To the extent that this proposed finding states that the application was filed and granted "on or about April 1, 1993," it has been rejected because it is contrary to the greater weight of the evidence. Otherwise, it has been accepted and incorporated in substance.

5. Accepted and incorporated in substance.

6. To the extent that this proposed finding states that (a) Mesa filed DR-15s "throughout the audit period," as opposed to only for approximately the last six months of the audit period, and (b) NAT, Inc., was at the time the "previous owner" of the business, it has been rejected because it is contrary to the greater weight of the evidence. Otherwise, it has been accepted and incorporated in substance.

7. To the extent that this proposed finding suggests that TAN, Inc., (or Mesa) was the owner of Shuckers from December of 1992 through the end of the audit period, it has been rejected because it is contrary to the greater weight of the evidence.

8. Accepted and incorporated in substance.

9. To the extent that this proposed finding suggests that TAN, Inc., (or Mesa) assumed ownership of the business from "previous owners," it has been rejected because it is contrary to the greater weight of the evidence. Otherwise, it has been accepted and incorporated in substance.

10. Before "and:" Accepted and incorporated in substance; After "and:" Not incorporated in this Recommended Order because, even if true, it would not change the outcome of the instant case.

11. Not incorporated in this Recommended Order because it would add only unnecessary detail to the factual findings made by the Hearing Officer.

12. Accepted and incorporated in substance.

13. First and second sentences: To the extent that these proposed findings state that (a) TAN, Inc., (or Mesa) was transferred ownership of the business, and (b) TAN, Inc., (or Mesa), as opposed to the owner of the business, "received 50 percent of the proceeds of the business," they have been rejected because they are contrary to the greater weight of the evidence. Otherwise, they have been accepted and incorporated in substance; Third sentence: Not incorporated in this Recommended Order because it would add only unnecessary detail to the factual findings made by the Hearing Officer.

14. Accepted and incorporated in substance.

15. First sentence: Accepted and incorporated in substance; Second and third sentences: Not incorporated in this Recommended Order because, even if true, they would not change the outcome of the instant case.

16. To the extent that this proposed finding suggests that TAN, Inc., (or Mesa) assumed ownership of the business from a "prior owner," it has been rejected because it is contrary to the greater weight of the evidence. Otherwise, it has been accepted and incorporated in substance.

17. Accepted and incorporated in substance.

18. To the extent that this proposed finding suggests that ownership of the business was transferred to TAN, Inc., (or Mesa) by a "previous owner," it has been rejected because it is contrary to the greater weight of the evidence. To the extent that it states that TAN, Inc., and Mesa were "assessed tax under transferee liability for lease payments made by [Woods' corporations] on which no tax was shown to have been paid," it has been accepted and incorporated in substance.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

ALL PARTIES HAVE THE RIGHT TO SUBMIT WRITTEN EXCEPTIONS TO THIS RECOMMENDED ORDER. ALL AGENCIES ALLOW EACH PARTY AT LEAST 10 DAYS IN WHICH TO SUBMIT WRITTEN EXCEPTIONS. SOME AGENCIES ALLOW A LARGER PERIOD OF TIME WITHIN WHICH TO SUBMIT WRITTEN EXCEPTIONS. YOU SHOULD CONTACT THE AGENCY THAT WILL ISSUE THE FINAL ORDER IN THIS CASE CONCERNING AGENCY RULES ON THE DEADLINE FOR FILING EXCEPTIONS TO THIS RECOMMENDED ORDER. ANY EXCEPTIONS TO THIS RECOMMENDED ORDER SHOULD BE FILED WITH THE AGENCY THAT WILL ISSUE THE FINAL ORDER IN THIS CASE.