

Issue Four. Should penalties be assessed based upon the facts and circumstances [of this proceeding].

PRELIMINARY STATEMENT

Respondent audited Petitioner for the period December 1, 1986, through November 30, 1991. As a result of that audit, Respondent asserted that Petitioner owed sales and use tax, transit surtax, and infrastructure tax. Petitioner timely challenged the assessment and made certain payments pursuant to Section 120.575(3), Florida Statutes. The dispute was referred to the Division of Administrative Hearings, and this proceeding followed. The parties stipulated to the facts that underpin this dispute and thereafter declined the opportunity for oral argument. Both parties submitted a proposed recommended order which contained the stipulated facts and the respective arguments on the issues. The findings of fact contained in this Recommended Order are based completely on the stipulation of the parties. Consequently, the proposed findings of fact submitted by the parties are adopted by the Recommended Order.

FINDINGS OF FACT

1. Petitioner is an Illinois Corporation headquartered in Texas and licensed to do business in Florida.

2. Petitioner owns and operates video and arcade game amusement centers, hereafter referred to as centers.

3. Petitioner sells to center customers the opportunity to play the games in the centers.

4. Petitioner purchases the games from sources outside itself; it does not manufacture the games it makes available in its centers.

5. Petitioner paid sales tax upon the purchase of machines purchased in Florida and use tax upon the purchase of machines outside Florida and imported for use inside Florida.

6. The Florida Department of Revenue (DOR) is the State of Florida agency charged with the enforcement of Chapter 212, Florida Statutes, Tax on Sales, Use and Other Transactions, the Transit Surtax, and the Infrastructure Surtax -- the state and local taxes at issue in this case.

7. The DOR audited Petitioner for the period December 1, 1986 through November 30, 1991, hereafter referred to as the audit period.

8. During the audit period, Petitioner operated 12 centers in the State of Florida. For purposes of the instant litigation, references to the centers will mean only the centers located in Florida.

9. The audit determined that Petitioner owed \$51,593.37 in sales and use tax, \$440.81 in transit surtax, and \$1,459.80 in infrastructure surtax. Each of the sums assessed included penalty and interest accrued as of September 13, 1994.

10. In accordance with section 120.575(3), Florida Statutes, Petitioner paid \$32,280 as follows:

a. sales and use tax	\$22,411
b. interest	8,575
c. charter transit surtax	234
d. interest	64
e. infrastructure surtax	750
f. interest	246

11. The centers make available three types of games. The games are activated either by a coin or a token that is purchased at the center.

a. Video games include pinball machines and electronic games which do not dispense coupons, tickets or prizes.

b. Redemption games include skeeball, hoop shot and water race which dispense coupons or tickets which the player earns according to his or her skill.

c. Merchandise games include electronic cranes which the operator or player maneuvers to retrieve a prize directly from the machine. Merchandise games do not dispense coupons or tickets.

12. The tickets earned in the course of playing redemption games can be exchanged for prizes displayed at the centers.

13. The prizes obtained directly from the merchandise games and exchanged following receipt from redemption games are termed "plush."

14. Plush may be obtained only by seizing it in a redemption game or by redeeming coupons earned during the play of redemption games; it may not be purchased directly for cash.

15. A merchandise game does not dispense an item of plush upon the insertion of a coin or token and activation of the crane's arm -- acquisition of plush requires a certain level of skill on the player's part.

16. A redemption game does not dispense an item of plush upon the insertion of a coin or token and the push of a button -- acquisition of tickets requires a certain level of skill on the player's part.

17. Petitioner purchases plush in bulk and distributes it to the various centers.

18. Each of the centers sells some of its games to individual buyers.

19. Petitioner's headquarters coordinates the sale.

20. For each of the years in the audit period, the centers sold games at various dates.

21. Petitioner characterizes as its "annual sale" the period November 1 through January 10 when most of the sales took place.

22. The specific dates for the sales that took place during the audit period follow; numbers in square brackets indicate the number of sales on a particular date if there is more than one.

a. December 1986 through July 1987 -- no information available -- but more than one sale was made during this time.

b. November 1987: 2, 5, 7, 10, 17, 18[2], 20, 22, 25, 28[3]

c. December 1987: 2, 4, 7, 15, 18, 23

d. November 1988: 4, 5, 7[2], 9, 10, 11, 17, 18, 20[2], 21[2], 25, 26, 28,
29

e. December 1988: 6, 7, 8, 10[2], 12[2], 16, 21, 22, 23[2], 24

f. January 1989: 3, 6, 7[4], 9, 12

g. November 1989: 6, 15, 16[2], 20

h. December 1989: 1, 6, 10, 22, 29[3], 31

i. January 1990: 26

j. March 1990: 26

k. April 1990: 26

l. June 1990: 12

m. November 1990: 3, 9, 13[2], 14, 16, 19, 24, 26

n. December 1990: 1, 2, 7, 20

o. January 1991: 8

p. May 1991: at least 1

q. November 1991: 4, 9, 10, 14, 15, 21

23. Petitioner did not provide its machine vendors resale certificates upon Petitioner's purchase of the games.

24. Petitioner did not provide its plush vendors resale certificates upon Petitioner's purchase of plush.

25. Petitioner did not apply for a refund of sales tax paid upon its purchase of games in Florida.

CONCLUSIONS OF LAW

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

27. Petitioner asserts that its sales of obsolete games are exempt from taxation as occasional or isolated sales and that its purchases of plush and its

purchases of video games are exempt from taxation as sales for resale. Petitioner has the burden of proving by a preponderance of the evidence that it is entitled to the exemptions it claims. Rule 28-6.08(3), Florida Administrative Code. See also, Florida Department of Transportation v. J.W.C., Co., 396 So.2d 778 (Fla. 1st DCA 1981). Petitioner also asserts that reasonable cause exists for the Respondent to compromise the imposition of penalties pursuant to Rule 12-13.007, Florida Administrative Code. It is Petitioner's burden to establish that Respondent's refusal to compromise the penalties imposed against Petitioner is contrary to law, rule, or policy, that it is arbitrary or capricious, or that it is otherwise an abuse of agency discretion.

28. Section 212.05, Florida Statutes (1985), provides for the taxation of the sale at retail of tangible personal property. This tax is either in the form of a sales tax or a use tax. Section 212.05, Florida Statutes (1985), provides, in pertinent part, as follows:

It is hereby declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this state . . .

29. A purchaser may be liable for the payment of sales and use taxes pursuant to Section 212.07(9), Florida Statutes (1985), which provides, in pertinent part, as follows:

(9) Any person who has purchased at retail, used, consumed, distributed, or stored for use or consumption in this state tangible personal property . . . and cannot prove that the tax levied by this chapter has been paid to his vendor . . . is directly liable to the state for any tax, interest, or penalty due on any such taxable transactions.

30. Section 212.02(2)(a), Florida Statutes (1985), defined the term "sale", in pertinent part, as follows:

(2) "Sale" means and includes:
(a) Any transfer of title or possession, or both, exchange, barter, lease, or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration.

31. Rule 12A-1.037, Florida Administrative Code, provided, at the times pertinent to this proceeding, as follows:

(1)(a) Occasional or isolated sales of tangible personal property made by a person who does not hold himself out as engaged in business are exempt (from sales and use tax).
(b) An occasional or isolated sale occurs when the sale is made by the owner of tangible personal property under the following circumstances:
1. The seller does not hold himself out as engaged in business and such sales or series of sales occur no more frequently than 2 times during

any 12 month period. The third sale or series of sales of tangible items during any 12 month period makes that person engaged in that business, and that person is required to register as a dealer and to collect and remit tax on the third sale or series of sales and on all subsequent sales.

* * *

4. Sales by a person of his household furniture or by a farmer or his farm machinery or equipment, or by a grocery store of its fixtures are exempt because such persons are not engaged in the business of selling tangible personal property of a similar type. An office equipment dealer cannot make an exempt, occasional or isolated sale when he sells his own furniture, fixtures and equipment because of the definite similarity between the commodity he handles and the equipment which he sells.

5. The sale of office equipment, furniture and fixtures, etc., included in the sale of a business by its owner who is not engaged in the business of selling such office equipment, furniture and fixtures, is exempt as an isolated sale.

6. When a road contractor purchases a piece of equipment and pays the tax thereon and subsequently sells it, the sale of such equipment is exempt. Any rental of such equipment is taxable.

32. Petitioner relies on Rule 12A-1.037, Florida Administrative Code, in asserting that the sales of its "obsolete" video games are occasional or isolated sales. 1/ The parties stipulated that each of the twelve centers it operated in Florida sells games to individual buyers. The various dates on which sales of these video games occurred are set forth for each of the tax years involved (Paragraph 22). These stipulated facts establish that these sales of video games occurred many times more than twice during any tax year. Because of the frequency of these sales, Petitioner is deemed to be in the business of selling these video games pursuant to Rule 12A-1.037(1)(b)1., Florida Administrative Code, and not entitled to the claimed exemption. The examples of exempt sales contained in the rule are not analogous to Petitioner's sales of its video games and do not establish Petitioner's right to the exemption.

33. Petitioner failed to establish that the sales of video games are exempt from taxation as isolated or occasional sales. Consequently, Issue One is answered in the negative.

34. Issues Two and Three involve whether Petitioner's purchases of video games and its purchases of plush are exempt from Florida sales and use tax as sales for resale.

35. Pursuant to Section 212.02(3)(a), Florida Statutes (1985), the terms "retail sale" and "sale at retail" do not include a sale for resale. Section 212.03(3)(a), Florida Statutes (1985), provided, in pertinent part, as follows:

(3)(a) "Retail sale" or a "sale at retail" means a sale to a consumer or to any person for any purpose other than for resale in the form of tangible personal property and includes all such

transactions that may be made in lieu of retail sales or sales at retail. A resale must be in strict compliance with the rules and regulations, and any dealer making a sale for resale which is not in strict compliance with the rules and regulations shall himself be liable for and pay the tax. . . .

36. Respondent relies on Rule 12A-1.038, Florida Administrative Code, which provides, in part, as follows:

(1) It is the specific legislative intent that each and every sale . . . is taxable under Chapter 212, F.S., unless such sale . . . is specifically exempt. The exempt status of the transaction must be established by the dealer. Unless the dealer shall have taken from the purchaser a certificate . . . to the effect that the property or service was purchased for resale . . . the sale shall be deemed to be a taxable sale at retail . . .

* * *

(3)(a) A resale certificate is required from every purchaser who purchases tangible personal property or service for resale, subject to the provisions of subsection (1) of this rule.

37. The parties stipulated that Petitioner did not provide its vendors resale certificates when it purchased the video games or the plush at issue in this proceeding (Paragraphs 24 and 25).

38. While it may be that most, if not all, of the video games purchased by Petitioner are subsequently resold, it is inferred from the stipulated facts that Petitioner purchased the games to be played in its centers and not for the purpose of reselling them to the consuming public. Petitioner did not establish a factual basis upon which it can be concluded that the initial purchase of these games is exempt as a sale for resale.

39. The parties stipulated that the Petitioner sells to its customers the opportunity to play the games in its centers (Paragraph 3). The parties also stipulated that the games do not dispense plush upon the insertion of a coin or a token and that the acquisition of plush, whether from a merchandise game or as the result of a redemption game, requires a certain level of skill (Paragraphs 15 and 16). Because the player does not know what item of plush, if any, that he or she will win, it cannot be concluded that the player inserts the coin or token in the game with the notion that he or she is purchasing a prize. Based on the stipulated facts, it is concluded that the player inserts the coin or token in the game for the opportunity to play the game, not for the purpose of purchasing plush. Petitioner failed to establish that its purchases of plush are exempt from sales and use tax as sales for resale.

40. Issue Three also involves whether the imposition of tax on Petitioner's vending revenues and the imposition of sales and use tax on its purchases of plush represent an inequitable double taxation. Section 212.12(12), Florida Statutes (1985), provided as follows:

(12) It is hereby declared to be the legislative intent that, whenever in the construction, administration, or enforcement of this chapter there may be any question respecting a duplication of the tax, the end consumer, or last retail sale, be the sale intended to be taxed and insofar as may be practicable there be no duplication or pyramiding of the tax.

41. Petitioner's argument that the imposition of tax on its purchase of plush and the imposition of tax on its vending revenues constitute an impermissible pyramiding of sales and use tax is dependent on a finding that Petitioner resells plush to the consuming public and that the taxes on its vending revenues should be construed to be the imposition of sales or use tax on that resale. Petitioner failed to establish the factual assertions that underpin its argument. Petitioner did not establish that there was a resale of plush to the consuming public, nor did it establish that the tax imposed on its vending revenues should be construed to be pyramiddally sales or use tax on its resale of plush. Consequently, its argument that there was an impermissible pyramiding of sales or use taxes must fail.

42. Issues Two and Three are answered in the negative. Since the Petitioner is not entitled to these claimed exemptions, it is responsible for paying the taxes at issue pursuant to Section 212.07(9), Florida Statutes (1985).

43. Petitioner does not challenge Respondent's authority to impose penalties in this proceeding. Instead, Petitioner asserts that reasonable cause exists to compromise those penalties. Section 213.21, Florida Statutes (1985) provides for the compromise of penalties as follows:

(2)(a) The executive director of the department or his designee is authorized to enter into a written closing agreement with any taxpayer settling or compromising the taxpayer's liability for any tax, interest or penalty . . .

(3) A taxpayer's liability for . . . penalties . . . may be settled or compromised if it is determined by the department that the noncompliance is due to reasonable cause and not to willful negligence, willful neglect, or fraud.

44. Rule 12-13.003, Florida Administrative Code, sets forth the standards under which tax, interest and penalties may be compromised. Succinctly stated, the standard used in determining whether reasonable cause exists to compromise a penalty is whether the taxpayer exercised ordinary care and prudence and was nevertheless unable to comply with the provisions imposing the pertinent tax. Having found little merit in Petitioner's rationale in support of its claimed exemptions, it is concluded that the Respondent has failed to establish that the Respondent's refusal to compromise the penalty should be reversed. Issue Four should be answered in the affirmative.

RECOMMENDATION

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

RECOMMENDED that Respondent enter a final order that adopts the findings of fact and the conclusions of law contained herein. The assessments against Petitioner should be sustained to the extent the assessments are consistent with the findings of fact and the conclusions of law contained in this Recommended Order.

DONE AND ENTERED this 28th day of June, 1996, in Tallahassee, Leon County, Florida.

CLAUDE B. ARRINGTON, Hearing Officer
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of June, 1996.

ENDNOTE

1/ The parties did not stipulate that only obsolete video games are sold by the various centers. The parties stipulated that "[e]ach of the centers sells some of its games to individual buyers" (Paragraph 18). From that stipulation, it will not be concluded that only "obsolete games" are sold. It would not change the ultimate conclusions reached if the parties had stipulated that only "obsolete" games are sold at the centers.

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 ten 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.