

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RICHARD E. WELLS,)
)
 Petitioner,)
)
vs.) CASE NO. 94-7256
)
DEPARTMENT OF REVENUE,)
)
 Respondent.)

)

RECOMMENDED ORDER

Pursuant to notice, this cause came on for formal hearing before P. Michael Ruff, duly-designated Hearing Officer of the Division of Administrative Hearings, on April 8, 1996, in Pensacola, Florida.

APPEARANCES

For Petitioner: Richard E. Wells, pro se
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Post Office Box 505
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For Respondent: Jarrell L. Murchison, Esquire
Office of the Attorney General
The Capitol - Tax Section
Tallahassee, Florida 32399-1050

STATEMENT OF THE ISSUES

The issue to be resolved in this proceeding concerns whether the Petitioner is liable for sales tax, together with interest and penalties on the purported unpaid tax amount, as referenced in the assessment and the Respondent agency's notice of decision issued on October 18, 1994.

PRELIMINARY STATEMENT

This cause was initiated upon the conclusion of an audit conducted by the Respondent, Department of Revenue (Department), concerning payment of sales taxes by the Petitioner, Richard E. Wells, d/b/a the Marina Restaurant, during the period of October 1, 1987 through December 31, 1992 (the audit period). The Department made an initial determination that the gross sales of the restaurant were not fully reported to the Department and that all sales taxes were, therefore, not paid. The Department took the position that there was a dearth of records of revenues and sales taxes collected by the Petitioner, such that it elected to rely on revenue figures reported in the Petitioner's federal income tax returns. The Department believes that the taxpayer, the Petitioner, should be assessed in the amount of \$71,308.30. This figure represents \$45,694.90 of sales tax, \$14,093.37 of interest thereon, \$11,041.36 of penalties, and \$314.98 of use tax, with \$91.02 of interest, and \$72.67 of penalties thereon. Daily

interest of \$15.13 commencing on February 13, 1993, the date of the notice of proposed assessment, was also assessed. In the notice of proposed assessment dated February 12, 1993, the Department also assessed the amount of \$1,060.97 for the audit period, which includes penalties and interest, for local government infrastructure surtax, with daily interest thereon in the amount of \$.29, commencing on February 15, 1993.

The Petitioner filed a letter of protest with the Respondent dated February 11, 1994. On October 18, 1994, a notice of decision was issued by the Department sustaining the proposed assessment amounts. The Petitioner contested the assessment and filed a petition with the Respondent dated December 13, 1994. The dispute was, in due course, transmitted to the Division of Administrative Hearings for resolution and this formal proceeding ensued.

The parties requested that the matter not be scheduled for hearing until May 1995, whereupon a notice was issued scheduling the hearing for May 12, 1995. On April 28, 1995, a joint motion for continuance was filed indicating that the parties did not believe that a final hearing was necessary at that time and that settlement negotiations were under consideration between the parties. On June 12, 1995, the parties filed a joint status report, at the direction of the Hearing Officer, indicating that the cause was not in a position to proceed to final hearing at that time and requesting that a status report be required only after a period of at least 90 days.

The Marina Restaurant, revenues and records of which are the essential subject of this proceeding, burned to the ground on or about April 12, 1995. The Department requested certain documentation from the Petitioner pertaining to the fire and the payment of insurance proceeds. The search for relevant records and the discovery process engendered a substantial delay in the proceeding. Ultimately, the matter was scheduled for hearing, upon the failure of settlement negotiations, for April 8, 1996.

The cause came on for hearing as noticed. The Petitioner testified on his own behalf at hearing but offered no exhibits into evidence. The Respondent presented the testimony of Gina Imm, the auditor who performed the audit on the Petitioner. The Respondent introduced into evidence Exhibits 1-7, which were admitted without objection.

Upon conclusion of the proceeding, a transcript thereof was ordered and was duly filed with the Hearing Officer. Upon joint request of the parties, the time for submitted post-hearing Proposed Recommended Orders was extended by the Hearing Officer, so that Proposed Recommended Orders became due on June 4, 1996. Those Proposed Recommended Orders were timely submitted. The proposed findings of fact contained therein are addressed in this Recommended Order and again in the Appendix attached hereto and incorporated by reference herein.

FINDINGS OF FACT

1. The Petitioner is the sole proprietor of a marina and restaurant business located in Pensacola Beach, Florida. The Respondent is an agency of the State of Florida charged with enforcing pertinent statutes and rules providing for the collection of sales and use taxes, as well as penalties and interest for tax amounts determined to be due and payable but not timely paid to the Department and the State of Florida. Included within the Department's regulatory authority over the assessment and collection of sales and use taxes is the authority to conduct audits of taxpayers to determine amounts of tax due and owing to the State, as well as whether such taxes have been timely and

properly remitted and otherwise accounted for. The relevant audit period involved in this proceeding extended from October 1, 1987 through December 31, 1992.

2. The Petitioner's marina and restaurant business operated during the audit period was operated on property owned by the Santa Rosa Island Authority (Authority) and the State of Florida Department of Natural Resources (now Department of Environmental Protection, DEP). The property was leased to the Petitioner for the purpose of operation of this business.

3. The property leased by the Petitioner from the Authority consisted of certain land above the mean high water mark and five boat slips. These five boat slips will be referred to sometimes hereafter as the "Santa Rosa boat slips".

4. During the audit period, the Petitioner operated the restaurant business on the property leased from the Authority and rented the five boat slips to various boating customers. The Petitioner also rented 70 other boat slips to customers during the audit period. These slips were built by the Petitioner in 1977 on submerged land which had been leased from the State of Florida, Department of Natural Resources, Bureau of Land Management. This property adjoined the property leased from the Authority.

5. On November 16, 1992, the Department sent to the Petitioner a notice of intent to audit its books and records. As part of the audit, the Department requested that the Petitioner produce various records, including but not limited to, the Petitioner's federal tax returns, Florida corporation income tax returns, Florida sales and use tax returns, depreciation schedules, general ledgers, property records, cash receipts journals, cash disbursement journals, purchase journals, general journals, sales journals, sales invoices, shipping documents, purchase invoices, intangible property records, sales tax exemption certificates and lease agreements for the real or tangible property involved in the Petitioner's business.

6. The Petitioner basically was able to provide few records to support his restaurant sales and boat slip rental receipts, except for Florida sales tax returns and federal income tax returns. There were no sales control documentation records, such as general ledgers and general journals provided to the Department's auditor for review, except for a cash register tape for the night of December 1, 1992, representing that night's restaurant gross receipts activity.

7. The Petitioner's method of record keeping essentially consisted of his writing down the gross sales each evening from the cash register tapes, totaling those figures at the end of the month, and reporting this total on his Florida sales tax returns as the gross receipts from the restaurant business. However, the Petitioner did not keep the cash register tapes or maintain other documents to support the information reported to the Respondent on the monthly sales tax returns.

8. The Petitioner reported as, "exempt income," the rental from the boat slips for the five Santa Rosa boat slips on the monthly sales tax returns filed with the Respondent. He did not report his monthly rental income from the remaining 70 boat slips on his sales tax returns filed with the Respondent. He did report a great deal more gross receipts on his federal income tax returns than on his Florida sales tax returns.

9. The Department compared the Petitioner's federal income tax returns during the audit period with his Florida sales tax returns and determined that the gross receipts reported to the federal government were substantially larger than the gross receipts reported to the Department. It determined that the primary difference in the gross receipts was attributable to rental revenues from the boat slips, which were not accounted for by the Petitioner in his Florida monthly sales tax returns.

10. The auditor determined that four percent of the recorded restaurant gross receipts were attributable to alcohol sales and 96 percent to food sales.

11. The Department calculated the sales tax due on the undisclosed income through the audit, which represented gross receipts from the restaurant business and the boat-slip rental business, which was not reported by the Petitioner on his Florida sales tax returns. It calculated the sales tax due during the audit period on the rentals of the five boat slips, which were improperly listed as exempt sales on the Petitioner's monthly sales tax returns filed with the Respondent.

12. It was also revealed that during the audit period, the Petitioner had sub-leased a portion of the Santa Rosa property to his former wife for \$5,000.00 per year. The Department calculated that the Petitioner owed \$300.00 in taxes based upon the sub-lease to his former wife.

13. The Department additionally calculated that the Petitioner owed an additional \$314.00 for use taxes, based upon non-exempt purchases of tangible personal property.

14. The Department assessed the Petitioner's sales taxes based upon the estimated boat-slip rental receipts, although it did not assess the lease payments made by the Petitioner to the Authority or to the State of Florida, Department of Natural Resources.

15. On February 12, 1993, the Department assessed the Petitioner a total of \$71,308.30 for the audit period, representing \$45,694.90 of sales tax due, \$14,093.37 of interest due thereon, \$11,041.36 of penalties, and \$314.98 of use tax, together with \$91.02 of interest due on use taxes unpaid, and \$72.67 of penalties due thereon. Daily interest of \$15.13 commencing on February 13, 1993 was also assessed.

16. Additionally, on February 12, 1993, the Department assessed the Petitioner \$1,060.97 for the audit period, including penalties and interest, for local government infrastructure surtax due. Daily interest of \$.29, commencing on February 13, 1993, was assessed on that amount.

17. The Petitioner, in essence, does not dispute the Department's calculation of the assessed amount. The Petitioner, rather, contends that he believes that he reported all income and paid all sales taxes which were due and that his certified public accountant failed to account properly for his gross receipts and income to the federal internal revenue service, without the Petitioner's knowledge, during the audit period. He maintains, therefore, that the method of calculation of the Department's tax assessment, based upon the difference between the gross receipts depicted on the federal income tax returns and on the sales tax returns filed with the Department, is inaccurate, apparently because of the CPA's errors. Additionally, the Petitioner maintains that he was of the belief that the boat-slip rentals were not taxable and reportable for sales tax purposes to the Department because he believes, citing

Rule 12A-1.061(5)(a) and (b), Florida Administrative Code. He bases this view on his assertion that the persons residing in the boat slips were "95 percent" live-aboard-type tenants, residing on their boats and that, essentially, they treated their boats as beach homes or condominiums, etc., for purposes of that rule, by residing for longer periods than six months. He thus contends that the rental revenues from such residents were tax exempt.

18. The Department, however, established through its auditor's testimony and the Department's Composite Exhibit 2, that the Petitioner's CPA, through information he generated, did not establish that the difference between the gross receipts reported to the internal revenue service on the federal tax returns and the gross receipts reported on the Florida sales tax returns was not taxable. The Petitioner's proof does not show the factual elements necessary to establish that the 75 boat slips meet the rule's standard for exempt revenues from non-taxable residences.

CONCLUSIONS OF LAW

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

20. It is provided in Section 120.575(2), Florida Statutes, that the Department's burden of proof is limited to a showing that an assessment has been made against the taxpayer and its factual and legal basis. Once that demonstration has been made by the Department, the burden shifts to the taxpayer, the Petitioner, to demonstrate by a preponderance of the evidence, that the assessment is incorrect. See, Department of Revenue v. Nu-Life Health and Fitness Center, 623 So.2d 747, 751-752 (Fla. 1st DCA 1992).

21. The Petitioner failed to maintain or to supply adequate records, as required by Section 213.35, Florida Statutes (1991). See, also, Rule 12A-1.093, Florida Administrative Code. When a person or dealer, in the status of the Petitioner, fails to make available records for purposes of audit by the Department, as was the case in this situation, it is the duty of the Department to "make an assessment from an estimate based upon the best information then available to it for the taxable period." Section 212.12(5)(b), Florida Statutes (1991).

22. The record in this case clearly establishes that the Department was justified in using the Petitioner's own figures filed on his federal income tax returns and those on the Florida sales tax returns as the best information available, given the paucity of records supplied to the Department. The sales tax deficiency resulted from the Petitioner's failure to report the full amount of his gross receipts on the monthly sales tax returns filed with the Respondent. The Petitioner's position that apparently his failure to pay the assessed amount was due to inadvertence or a mistake as to the operative effect of the relevant statutes and rules, by him and by his CPA, is immaterial. The Department is not seeking to establish that the subject deficiency was due to any fraudulent intent on the Petitioner's part.

23. The preponderant evidence clearly establishes that the Department was justified in using the so-called "exempt sales" figures from the Petitioner's monthly sales tax returns for assessing sales tax on the five Santa Rosa boat-slip rentals, which, indeed, were not exempt from taxation. Rental amounts obtained from leasing boat slips are taxable as rentals or leases of real property by authority of Section 212.031(1)(a), Florida Statutes (1991), and

Rules 12A-1.070 and 12A-1.073(1)(b), Florida Administrative Code. The Petitioner failed to offer any significant proof that the boat slips were residences which qualified for the exemption referenced in Rule 12A-1.061(5)(a) and (b), Florida Administrative Code.

24. The gross receipts from food and drink sold at the Petitioner's restaurant are taxable, pursuant to Section 212.05, Florida Statutes (1991), and Rules 12A-1.011 and 12A-1.057, Florida Administrative Code. The Petitioner has not demonstrated facts, by a preponderance of the evidence, which would entitle him and any of his operations involved in this proceeding to be exempt from taxation, pursuant to the exemption provision at Section 212.08, Florida Statutes (1991). According to Section 212.08(13), Florida Statutes:

No transaction shall be exempt from the tax imposed by this chapter except those expressly exempted herein . . .

None of the transactions or operations were shown to fit within the exemptions specifically granted by that section.

25. In a case contesting the correctness or extent of the tax assessment, including penalties and interest thereon, brought by a petitioner or plaintiff before the circuit court or the Division of Administrative Hearings, the burden to present facts to support the petition or complaint contesting the assessment is on the petitioner or plaintiff. See, *Smith's Bakery, Inc. v. Jernigan*, 134 So.2d 519, 521 (Fla. 1st DCA 1961). Tax assessments such as those in the instant case are considered prima facie correct upon a prima facie showing of the facts supporting the assessment made by the Department, with the burden on the party against whom the assessment is made to overcome that showing by a preponderance of the evidence. *Department of Revenue v. Nu-Life Health and Fitness Center*, supra. See, also, *In re: Estate of Ziy*, 223 So.2d 42, 43 (Fla. 1969). The Petitioner herein has not met that burden to show that the assessment was improper.

26. The Petitioner did not provide relevant, material factual evidence to show that the assessment was incorrect nor to show that the subject matter of the assessments or part of it was, in reality, exempt from taxation. The Petitioner's various legal and equitable arguments advanced, while they may demonstrate that the Petitioner had no fraudulent intent related to the tax deficiency involved, have no materiality or relevance to the issues in this proceeding.

27. The Department has established that the above-described calculations and resulting assessment of unpaid taxes, interest and penalties thereon have been calculated according to law, on the best information available to the Department, determined after ample opportunity for the Petitioner to augment that information and to show otherwise, to no avail. Therefore, the assessments of tax, interest and penalties are shown to be correct.

RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record and the candor and demeanor of the witnesses, it is, therefore

RECOMMENDED that a Final Order be entered by the Respondent assessing the taxes, penalties, and accumulated interest in the above-found amounts.

DONE AND ENTERED this 21st day of June, 1996, in Tallahassee, Florida.

P. MICHAEL RUFF, 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 21st day of June, 1996.

APPENDIX TO RECOMMENDED ORDER CASE NO. 94-7256

Petitioner's Proposed Findings of Fact

1. Accepted.
2. Accepted, based upon the Petitioner's testimony in this regard, but immaterial.
- 3-4. Rejected, as not established by preponderant evidence. The Petitioner did not show that all or even most of the tenants are on annual rentals and, moreover, if they were, the rule cited by the Petitioner himself requires that such lease agreements or contracts be written. The Petitioner has simply failed to establish that the boat-slip rental arrangements were exempt transactions.
5. Rejected, as incorrect as a matter of law and as immaterial and irrelevant.
6. Rejected, as immaterial and irrelevant to the issues in this proceeding.
7. Rejected, as subordinate to the Hearing Officer's findings of fact on this subject matter and as not probative by a preponderance of evidence that the assessment is incorrect.
8. Rejected, as immaterial to the issues in this proceeding. The Department is not seeking to establish fraudulent intent.
- 9-27. These constitute argument and enunciation of the Petitioner's and the Respondent's perceived legal positions, and attempted equitable arguments concerning justification for the Petitioner's lack of relevant records, including a description of his financial difficulties related to destruction of his business by fire and by two hurricanes. While this is understandable and regrettable, these arguments and positions asserted by the Petitioner are immaterial and irrelevant to the issues in this case.

Respondent's Proposed Findings of Fact

- 1-26. Accepted.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit to the agency 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.