

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

TERRY THOMAS CAROUSEL, INC.	)	
d/b/a THE CAROUSEL LOUNGE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 96-1934
	)	
DEPARTMENT OF REVENUE,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

This cause came on for formal hearing on May 27, 1998, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings, in Pensacola, Florida.

APPEARANCES

For Petitioner:	James L. Chase, Esquire 101 East Government Street Pensacola, Florida 32501
For Respondent:	Olivia P. Klein, Esquire Office of the Attorney General The Capitol, Tax Section Tallahassee, Florida 32399-1050

STATEMENT OF THE ISSUE

The issues are whether Respondent violated Chapter 212, Florida Statutes, by failing to pay sales tax and local government infrastructure surtax, and if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On or about August 25, 1993, Respondent State of Florida, Department of Revenue (Respondent) began an audit of Petitioner Terry Thomas Carousel, Inc. d/b/a The Carousel Lounge (Petitioner). Respondent audited Petitioner's state sales tax records for the period April 1, 1988 through March 31, 1993 and local government infrastructure surtaxes records for the period June 1, 1992 through March 31, 1993.

On April 7, 1994, Respondent issued a Notice of Intent to Make Sales and Use Tax Audit Changes and a Notice of Intent to Make Local Government Infrastructure Surtax Audit Changes.

On August 2, 1994, Respondent issued a Notice of Proposed Assessment of tax, penalty, and interest based on the audit of Petitioner's sales tax records. That same day, Respondent issued a Notice of Proposed Assessment of tax, penalty, and interest based on the audit of Petitioner's local government infrastructure surtax records. In response to these notices, Petitioner filed letters of protest.

On April 3, 1996, Petitioner issued a Notice of Decision, advising Respondent that he was being assessed \$48,085.08 in sales and use taxes for the period April 1, 1988 through March 31, 1993, and \$1,214.32 in local government infrastructure surtaxes for the period June 1, 1992 through March 31, 1993.

Petitioner filed a Petition for Formal Administrative Hearing with Respondent as to both audit assessments on April 17,

1996. Respondent referred the case to the Division of Administrative Hearings on April 23, 1996.

On May 8, 1996, the undersigned issued a Notice of Hearing, scheduling this case for formal hearing on September 9-12, 1996. Subsequently, the undersigned granted numerous requests for continuance. An order dated January 14, 1998, rescheduled the hearing for May 27-29, 1998.

On May 26, 1998, Petitioner filed a Motion to Enforce Settlement Agreement or Continue Hearing. Respondent filed a response to this motion during the hearing on May 27, 1998. After hearing oral argument, the undersigned denied the motion.

When the hearing commenced, the parties stipulated to the assessed sales tax and local government infrastructure surtaxes and related interest for all items listed in the audit reports with the exception of taxes attributable to alleged admission charges and souvenir sales. The contested issues at the hearing included alleged admissions charges, alleged souvenir sales, and penalties on all of the assessed items.

Respondent presented the testimony of three witnesses and offered seven exhibits which were admitted into evidence. Petitioner testified on his own behalf and presented the testimony of one witness. Petitioner offered one exhibit, which was admitted into evidence.

The transcript of the proceeding was filed with the Division of Administrative Hearings on July 6, 1998.

Petitioner filed his Proposed Recommended Order on June 21,  
Extend Time to File Respondent's Proposed Recommended Order.

Petitioner filed an amended Proposed Recommended Order on  
on August 21, 1998.

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1. At all times material to this proceeding, Peti  
owned and operated a bar and lounge business in Pensacola,  
of providing music and other entertainment to a variety of

2. Petitioner derived its revenue mainly from the sale of  
(admissions), souvenir sales, snack food sales, and vending  
vending machine.

that operated  
end of each business day, a "Z" tape would "cash out" each  
beverages. Each bartender would count up the cash in each drawer

would then compare her "Z" tape to the "change order" and mark the daily cash report, a deposit slip was prepared for that day's

4. From 1989 through January 1994, Petitioner charged door \$1.00 on Thursday and Friday nights and \$2.00 on Saturday nights. for adults and \$5.00 for eighteen through twenty-year olds,

5. For door admissions, Petitioner had a cash drawer.

6. At the end of each night when there was a door responsible for collecting the cover charge would go to the The money was placed in an envelope, together with a slip of shelf in the manager's safe. The shelf was designated as envelope, throw away the slip of paper indicating the amount, and

7. Cash sales that were not rung up on a cash register were kept at the bar. The proceeds from the sale of souvenirs,

jackets and T-shirts, were kept in the "drink cup" until the money was counted and placed in an envelope on Terry's shelf in the safe.

8. The prices for the jackets varied through the years. The average price of the jackets was between \$25.00 and \$35.00. The average price of the T-shirts was between \$7.00 and \$15.00. Some of the jackets and T-shirts were given away free. However, employees and customers did purchase both T-shirts and jackets from Petitioner.

9. Petitioner kept a guest list of persons that were given free admission to the club. It consisted of less than one legal sheet of paper during Petitioner's operation. Testimony by Terry Thomas that he had a guest list of 327 names and that at least one-third of those patrons were not charged an admissions fee on Friday and Saturday nights is not credible.

10. In conjunction with a routine audit, Respondent sent Petitioner a Notice of Intent to Audit Petitioner's books and records in April of 1993. Attached to this notice was a detailed list of the books and records required for review at the time of the audit.

11. Upon receipt of the notice, Petitioner directed Respondent's auditor to meet on August 25, 1993, with Petitioner's accountant. On that date, Respondent's auditor and Petitioner's accountant discussed the audit objectives and the records required for the audit. The auditor toured the

Petitioner's business premises with the accountant and began the review of Petitioner's bank deposits.

12. Due to the cash business that Petitioner operated, the auditor specifically requested that Petitioner produce its daily cash reports. The daily cash reports were essential as primary source material to allow the auditor to confirm Petitioner's bank deposit slips and bank statements and to determine the nature of Petitioner's daily cash sales and compliance with Florida tax laws.

13. In other words, a review of the daily cash reports would have allowed the auditor to verify that all the gross sales from the Petitioner's business were actually deposited. The daily cash reports also would have identified the type of sales that were attributable to the deposits.

14. Petitioner's accountant told Respondent's auditor that he used Petitioner's daily cash reports, bank statements, and bank deposits to report the monthly sales taxes due to Respondent. Therefore, Respondent's auditor knew that Petitioner's daily cash reports existed.

15. Petitioner's accountant produced the following in response to the auditor's request for Petitioner's books and records: (1) detail trial balances; (2) federal tax returns; (3) sales and use tax returns; (4) bank deposits; (5) purchase invoices; (6) depreciation schedules; and (7) the IRS Adjustment to Income. However, the documents produced by Petitioner's

accountant for the auditor's review did not include daily cash reports.

16. Petitioner's accountant informed Respondent's auditor that an Internal Revenue Service (IRS) audit was pending against Petitioner. It is a common practice to obtain information from the IRS when Respondent audits a taxpayer who is the subject of a known IRS audit.

17. In October of 1993, Respondent's auditor went through the process of requesting disclosure of information regarding Petitioner from the IRS. Respondent's auditor spoke with an IRS agent, Barbara Allen. Ms. Allen informed Respondent's auditor that, based on her audit, Petitioner derived a portion of its income from taxable door admissions and souvenir sales.

18. Ms. Allen provided Respondent's auditor with copies of the "Income Tax Examination Changes" form and "Explanation of Items" form from Petitioner's IRS audit file.<sup>1</sup> She did not provide Respondent's auditor with copies of Petitioner's daily cash reports.

19. The IRS audited Petitioner's federal corporate income tax returns for the fiscal years ending 1990, 1991, and 1992. In the process of this audit, Ms. Allen examined Petitioner's daily cash reports for 1990 and 1991 at the office of Petitioner's accountant. When Ms. Allen requested the daily cash reports for 1992, Petitioner's accountant told her they were not available.



20. Ms. Allen made copies of the 1990 and 1991 daily cash reports and left the originals with Petitioner's accountant.

21. The IRS agent was able to trace Petitioner's 1990 and 1991 daily cash reports from cash register receipts to a bank deposit slip.

22. Ms. Allen checked Petitioner's daily cash report for December 31, 1989, marked New Year's Eve. The total on the daily cash report for the sale of liquor and drinks was \$6,016.00, which was traceable to a bank deposit slip. On the same daily cash report, there was a notation "door" in the amount of \$2,441.00. The IRS agent could not trace the door charges to any bank deposit slip. More significantly, Ms. Allen was unable to trace the door charges, or "miscellaneous" income to any bank deposit.

23. Ms. Allen performed a cash flow analysis of Petitioner and Terry Thomas, individually, to calculate Petitioner's door charges and souvenir sales. The methods she used to make these calculations were reasonable under the circumstances.

24. Ms. Allen estimated the amount of unreported admission charges by a "best guess estimate" of the number of patrons paying an admissions charge on Thursday, Friday, and Saturday nights. She multiplied these figures by the amount of admission charges each night. Specifically, Ms. Allen considered the capacity of the club and estimated that 150 patrons paid \$1 every Thursday night, 250 patrons paid \$1 every Friday night, and 400

patrons paid \$2 every Saturday night, for all three years of the IRS audit. Ms. Allen also considered the amount of beverage sales for those nights.

25. To calculate the souvenir sales, Ms. Allen reviewed Petitioner's purchase invoices and multiplying the amount of such purchases by the estimated sales price. She assumed that Petitioner sold all of the souvenirs.

26. Petitioner's U.S. Corporate Income Tax Returns for the fiscal years ending 1989, 1990, and 1991 indicate that the Petitioner's gross income steadily increased from \$663,364.00 in 1989 to \$812,582,00 in 1991.

27. On February 24, 1994, Respondent's auditor learned from Petitioner's accountant that he could not find any daily cash reports for any portion of the audit period. According to the accountant, the IRS had the daily cash reports.

28. Respondent's auditor was required to use the "best information available" to determine the amount of Petitioner's door cover charges and souvenir sales because Petitioner failed to provide records relative to those items. The best and only information available was the information derived from the IRS audit.

29. Respondent's auditor did not conduct an independent investigation as to Petitioner's door charges or souvenir sales because Petitioner did not provide the records with which to perform such an investigation. Instead, Respondent's auditor

accepted the figures as adjusted on Petitioner's federal income tax by the IRS agent. Three years of the IRS Income Tax Examination Changes overlapped Respondent's five-year audit period.

30. The calculations of Respondent's auditor for Petitioner's door admissions and souvenir sales was reasonable. As to the door admissions, the auditor totaled the three years of IRS adjustments to Petitioner's income and divided by thirty-six months to reach an average monthly total. The auditor then projected the average monthly total of the thirty-six months over the five years of the audit period.

31. Respondent's auditor used the same methodology for calculating taxable sales of souvenirs. The auditor took the total three-year adjustment for income relating to souvenir sales, calculated the average monthly amount, and projected that figure over the five-year audit period.

32. Respondent's auditor found no indication of any door charges when he reviewed the records provided by Petitioner's accountant during the audit. Additionally, no resale certificates for souvenirs were provided to the auditor. Petitioner has not presented persuasive evidence that it paid sales taxes on all of its purchased souvenirs which were subsequently given away.

33. The most persuasive evidence indicates that Respondent's tax assessments on door admissions and souvenir sales were reasonable and proper under the circumstances.

#### CONCLUSIONS OF LAW

34. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

35. Respondent has met its burden of showing that it made an assessment against Petitioner and has provided the factual and legal grounds upon which the assessment was made. Section 120.80(14)(b)2., Florida Statutes. Petitioner has not met its burden of showing, by a preponderance of the evidence, that the factual and legal basis for the assessment is unreasonable or incorrect. Department of Revenue v. Nu-Life Health and Fitness Center, 623 So. 2d 747, 751-752 (Fla. 1st DCA 1992).

36. Section 95.091(3)(a)1.a., Florida Statutes, authorizes Respondent to conduct an audit "within 5 years after the tax is due, any return with respect to the tax is due, or such return is filed, whichever occurs first."

37. Respondent is authorized by law to "audit and examine the accounts, books, or records of all persons who are subject to a revenue law . . ." Section 213.34, Florida Statutes. See also Rule 12A-1.093(7)(a)2.a., Florida Administrative Code.

38. "Each person required by law to perform any act in the administration of any tax . . . shall keep suitable books and records relating to that tax, . . . and shall preserve such books and records until expiration of the time within which the department may make an assessment with respect to that tax pursuant to s. 95.091(3)." Section 213.35, Florida Statutes. See also Sections 212.12(6) and 212.13(2), Florida Statutes; Rules 12A-1.093(2) and 12A-1.093(5), Florida Administrative Code.

39. Respondent has the authority to prescribe the type of records that taxpayers must keep. Section 212.12(6)(a), Florida Statutes. Rule 12A-1.093(2), Florida Administrative Code, provides as follows:

(2) Each dealer defined in Chapter 212, F.S., each licensed wholesaler, and any other person subject to the tax imposed by Chapter 212, F.S., shall keep and preserve a complete record of all transactions, together with invoices, bills of lading, gross receipts from sales, RESALE CERTIFICATES, CONSUMER EXEMPTION CERTIFICATES and other pertinent records and papers as may be required by the Department of Revenue for the reasonable administration of Chapter 212, F.S., and such books of account as may be necessary to determine the amount of tax due thereunder.

40. In the event that a taxpayer does not make his records available for inspection, Respondent "has the duty to make an assessment from an estimate based upon the best information then available . . . [and] the assessment . . . shall be considered prima facie correct, and the burden to show the contrary shall

rest upon the dealer, seller, owner, or lessor, as the case may be." Section 212.12(5)(b), Florida Statutes.

41. Pursuant to Section 212.04(1)(a), Florida Statutes, a charge for admission to any place of amusement, sport, or recreation is a taxable transaction.

42. Section 212.02(14)(a), Florida Statutes, provides as follows:

(14)(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 or services taxable under this chapter, and includes all such transactions that may be made in lieu of retail sales or sales at retail.

43. A resale certificate permits a dealer to have an exemption from remitting sales tax on items sold for resale. Section 212.07(1)(b), Florida Statutes.

A resale must be in strict compliance with the rules and regulations, and any dealer who makes a sale for resale which is not in strict compliance with the rules and regulations shall himself or herself be liable for and pay the tax. . . .

Section 212.07(1)(b), Florida Statutes. See also Rules 12A-1.038 and 12A-1.093(8)(a), Florida Administrative Code.

44. During the audit of Petitioner's books and records, Respondent's auditor repeatedly requested that Petitioner furnish him with copies of its daily cash reports. Over one year elapsed between the issuance of the original Notice of Intent to Audit

and the termination of the formal audit. During this time, Petitioner did not produce the required records.

45. After the audit file was sent to Tallahassee, Petitioner had numerous opportunities in internal appeals and through litigation to produce any additional financial data to support its claims and to contradict the audit findings. Petitioner did not produce the required records.

46. Specifically, Petitioner failed to produce general ledgers, journals, or fully detailed daily cash reports, showing the amount of door admissions and souvenir sales. On the other hand, Respondent's auditor correctly relied on information furnished by the IRS. This information was the best, and only, information then available.

47. Even if Respondent's auditor had obtained Petitioner's daily cash reports and/or change orders from the IRS, those records only contained information related to the cash register receipts. They did not include information related to door admissions and souvenir sales .

48. Respondent's assessment for the sales and use tax, and the local government infrastructure surtax is reasonable and proper as to the disputed audit schedules A2 and A3. Petitioner has not provided credible evidence to the contrary.

#### RECOMMENDATION

Based upon the findings of fact and conclusions of law, it is

RECOMMENDED:

That Respondent enter a Final Order upholding its assessment against Petitioner in full, including all taxes, penalties, and interest statutorily due until date of payment for both the sales and use tax and the local government infrastructure.

DONE AND ENTERED this 29th day of September, 1998, in Tallahassee, Leon County, Florida.

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SUZANNE F. HOOD  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 29th day of September, 1998.



ENDNOTE

<sup>1/</sup> Both of these documents are dated October 18, 1993.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.