

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

PINELLAS REBOS CLUB, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 96-3150F
	)	
STATE OF FLORIDA, DEPARTMENT OF	)	
REVENUE,	)	
	)	
Respondent.	)	
_____	)	

FINAL ORDER GRANTING RESPONDENT'S MOTION FOR  
PARTIAL SUMMARY JUDGMENT AND DENYING PETITION FOR  
ATTORNEY'S FEES AND COSTS

This matter came before the undersigned on Petitioner, Pinellas Rebos Club's, Petition for Attorney's Fees and Costs. This matter was initiated when the Department of Revenue sought to revoke the Petitioner's consumer's certificate of exemption issued in 1989, which permitted Petitioner to purchase, free of tax, goods, rentals and services which would otherwise be subject to Florida sales tax.

After a formal hearing on the issue convened under Section 120.57(1), Florida Statutes, the undersigned, on February 8, 1996, issued a Recommended Order to the effect that the Pinellas Rebos Club's application for reissue of the exemption certificate be granted. Thereafter, on May 8, 1996, the Executive Director of the Department of Revenue, by Final Order, directed the approval of the application for exemption certificate, and that

the Club be issued a consumer certificate of exemption as a charitable institution.

On July 2, 1996, the Pinellas Rebos Club timely filed its Petition For Attorney's Fees and Costs Pursuant to Section 57.111, Florida Statutes, claiming that the Department's action denying the application for renewal of the exemption certificate "lacked a reasonable basis in law and fact", and the Department immediately requested an evidentiary hearing. On July 22, 1996, the Department filed its Counter-Affidavit and its Response to the Petition.

On August 6, 1996, the undersigned set the matter for an evidentiary hearing to be held in St. Petersburg on September 26, 1996, but On August 23, 1996, by letter, Petitioner's counsel asked for a continuance. When, on September 5, 1996, counsel for the Department objected to a continuance, a hearing was subsequently held by telephone conference on the question of the continuance and thereafter, on September 19, 1996, the undersigned entered an order continuing the hearing until October 10, 1996.

On September 23, 1996, the parties filed an Agreed Motion to Continue Hearing, and by Order dated September 25, 1996, the undersigned entered an Order canceling the October 10, 1996 hearing and placing the matter in abeyance until the Proposed Respondent's Motion For Summary Order was filed and responded to. On October 18, 1996, the Department filed its Motion for Partial

Summary Judgment. On November 1, 1996, the parties filed a Joint Stipulation as to the timetable for filing pleadings relating to the Motion for Partial Summary Final Judgment.

Thereafter, on November 14, 1996, Petitioner filed its Response to the Department's Motion For Partial Summary Final Judgment and Counter Motion for Partial Summary Final Judgment. On November 25, 1996, the Department filed its Response to Petitioner's Reply to Respondent's Motion for Partial Summary Judgment and its Reply to Petitioner's Counter-motion for Partial Summary Judgment. That same date, the Respondent also filed an Affidavit in Support of its Motion for Partial Summary Judgment. No further pleadings have been forthcoming from either party since that date and the resolution of this case is made on the record.

Section 57.111, Florida Statutes, also known as the Florida Equal Access to Justice Act, allows a prevailing small business party to seek reimbursement of attorney's fees and costs from the state in certain circumstances where it has been successful in seeking review of or defending against government action. A small business party is a "prevailing small business party" when, inter alia, a final judgment or order has been entered in favor of the small business party and has not been successfully appealed.

Unless otherwise provided by law, an award of attorney's fees and costs will be made to a prevailing small business party

in an adjudicatory or administrative proceedings initiated by a state agency unless the actions of the state agency action were substantially justified when initiated. A proceeding is "substantially justified" if it had a reasonable basis in law and fact at the time it was initiated by a state agency.

In the instant case, Petitioner submitted its Petition for Attorney's Fees and Costs on the basis that it had prevailed in the administrative proceedings before the undersigned, that a final order had been entered in its favor and had not been appealed, and, in substance, that the Department's initial denial of its application for re-issuance of its certificate of exemption was not reasonably based in law and fact and was, therefore, not substantially justified.

In proceedings under Section 57.111, Florida Statutes, the Petitioner bears the initial burden of proving that it is a small business party, that it prevailed, and that the underlying adjudicatory process was initiated by the state agency. Once this is done, the burden shifts to the agency to demonstrate its actions were substantially justified. Gentele vs. Department of Professional Regulation, Board of Optometry, 513 So.2d 672 (Fla. 1DCA 1987). The mere fact that a non-governmental party prevails in an administrative hearing does not, by itself, mean that the agency was not substantially justified in its initial position which gave rise to the agency action.

Here, the Department of Revenue's action denying

Petitioner's application for renewal of its exempt status was the underlying adjudicatory process which gave rise to the dispute, and it is clear that at the previous administrative hearing the Petitioner prevailed. It is undisputed that Petitioner is a "small business party" as defined in Section 57.111(3)(d), Florida Statutes.

The record shows, however, that the appropriate statute and agency rules in effect at the time the initial decision was made to deny the Petitioner's exemption, as reasonably applied, precluded Petitioner from receiving the exemption. Petitioner sought an independent hearing under Chapter 120, at which it was able to convince the Hearing Officer, through the presentation of evidence not previously provided to the Department, that the Department's interpretation of the facts were incorrect. The Recommended Order of the Hearing Officer thereafter convinced the agency head to conclude that, in light of the matters presented at the hearing, an award of an exemption to the Petitioner was appropriate.

Section 212.084, Florida Statutes, authorizes the Department to review all sales tax exemption certificates every five years to ensure that the institution, organization or individual possessing the certificate is actively engaged in an exempt endeavor as stipulated in the statute. It is not bound in any review cycle by a determination made regarding a specific entity in a previous cycle.

Considering the evidence presented at the hearing, and relating it to the matters before the agency at the time it made its initial decision to not renew Petitioner's exemption certificate, it is impossible to conclude other than that at the time that initial determination was made, it was substantially justified. It is, therefore:

**ORDERED THAT**

The Department of Revenue's Motion for Partial Summary Judgment is granted, and Petitioner's Petition for Award of Attorney's Fees and Costs is hereby DENIED.

**DONE and ORDERED** in Tallahassee, Florida this 6th day of, May, 1997.

---

**ARNOLD H. POLLOCK**  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(904) 488-9675 SUNCOM 278-9675  
Fax Filing (904) 921-6847

Filed with the Clerk of the  
Division of Administrative Hearings  
this 6th day of May, 1997.

**COPIES FURNISHED:**

Carl A. Schuh, Esquire  
256 3<sup>rd</sup> Street North  
St. Petersburg, Florida 33701

Olivia P. Klein, Esquire  
Office of the Attorney General  
Tax Section  
The Capitol, PL-01  
Tallahassee, Florida 32399-1050

Larry Fuchs  
Executive Director  
Department of Revenue  
104 Carlton Building  
Tallahassee, Florida 32399-0100

Linda Lettera  
General Counsel  
Department of Revenue  
204 Carlton Building  
Tallahassee, Florida 32399-0100

**NOTICE OF RIGHT TO JUDICIAL REVIEW**

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a notice of appeal with the Clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed. Alternatively, a party adversely affected by this Final Order may bring a civil action filed in Circuit Court under Section 230.23(4)(m)5., Florida Statutes, or bring a civil action in Federal Court.