

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

ALPHONSO THURMAN and	)	
BETTY THURMAN,	)	
	)	
Petitioners,	)	
	)	
vs.	)	Case No. 96-4751
	)	
DEPARTMENT OF REVENUE,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held by telephone conference call in this case on June 10, 1997, before J. D. Parrish, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner:	Alphonso Thurman, <u>pro se</u> Betty Thurman, <u>pro se</u> 13603 Southwest 102 Court Miami, Florida 33176
For Respondent:	Elizabeth T. Bradshaw Assistant Attorney General Office of the Attorney General The Capitol, Tax Section Tallahassee, Florida 32399-1050

STATEMENT OF THE ISSUES

Whether the Petitioners are responsible for a use tax on the purchase of tangible personal property as assessed by the Respondent and, if so, in what amount.

### PRELIMINARY STATEMENT

This case began on July 25, 1996, when the Department of Revenue (Department) entered a notice of final assessment for tax, penalty, and interest due against the Petitioners, Alphonso and Betty Thurman. The assessment notified Petitioners that the following amounts were claimed to be due: \$1,020.84 for the tax due; \$485.96 for the late filing penalty; \$137.87 for interest; and \$24.46 as an additional specific penalty. The total amount claimed by the Department was \$1,669.13.

The Petitioners requested an administrative hearing and alleged that the assessment was unjust due to their circumstances. Petitioners timely protested the assessment and requested that it be dismissed.

The case was forwarded to the Division of Administrative Hearings for formal proceedings on October 9, 1996. Subsequent to the granting of a joint motion to continue, the case was rescheduled for June 10, 1997.

At the hearing, the Department presented the testimony of the following witnesses: William Generette, a senior tax specialist employed by the Department; and Lourdes Ortiz-Alarkcon, a tax auditor also employed with the Department. Its exhibits numbered 1 and 2 have been admitted into evidence.

The Petitioners testified in their own behalf. Their composite exhibit which was filed after the hearing has been admitted into evidence.

A transcript of the proceeding was filed on July 2, 1997. The parties were granted leave to file proposed recommended orders within 10 (ten) days of the filing of the transcript. The Petitioners have not filed a proposed order. The Respondent's order was timely filed and considered in the preparation of this order.

#### FINDINGS OF FACT

1. The Department of Revenue is the state agency charged with the responsibility of collecting use tax in accordance with Florida law.

2. At all times material to the allegations of this case, Petitioners were residents of Miami, Florida.

3. In August, 1992, Hurricane Andrew struck the Miami area and destroyed most, if not all, of Petitioners' household furnishings. The Petitioners were devastated by their personal losses.

4. Financially the Petitioners did not recover enough from the losses to replace all that had been damaged or destroyed by the storm.

5. When it came time to refurnish their home, Petitioners traveled to North Carolina and selected new household furnishings which were paid for by them and imported into the State of Florida at their direction.

6. These household furnishings are considered tangible personal property under the applicable Florida laws.

7. The trucking companies which transported Petitioners' new furnishings were required to stop at Department of Agriculture and Consumer Services weigh stations, and copies of the bills of lading for Petitioners' personal property were produced and copied.

8. The Department of Revenue utilized such bills of lading to calculate the use tax owed and due on the Petitioners' personal property.

9. The Department of Revenue does not instruct the employees of the Department of Agriculture to stop particular kinds of trucks for inspection, but rather trains the Agriculture employees to look for certain kinds of commodities, in order to identify all commodities that may be subject to sales and use tax.

10. The Department of Agriculture employees are instructed by the Department of Revenue to forward to the Department of Revenue the bills of lading from those shipments containing consumer commodities that are for use or consumption and are subject to tax, and they are instructed not to forward bills of lading for items which are exempt from tax or which are intended for resale.

11. The purpose of this program is to assist the Department of Revenue in its enforcement of the sales and use tax.

12. A purchaser of goods from out-of-state is required to voluntarily comply with the statutes imposing the use tax.

13. The Department of Revenue calculated the amounts due from Petitioners for the use tax associated with their personal property imported into Florida and reduced such amounts to a final assessment. This assessment was issued by the Department on or about July 25, 1996.

14. Petitioners have not disputed the accuracy of the assessment nor the fact that they imported the personal property described in the bills of lading used to calculate the assessment.

15. Petitioners maintain that they should not be required to remit the tax set forth in the assessment as they were the victims of Hurricane Andrew and, but for their losses from that storm, would not have incurred the expense of new furnishings.

16. The final assessment identified the following sums owed by Petitioners: tax in the amount of \$1,020.84; penalty in the amount of \$510.42; and interest through July 25, 1996, in the amount of \$137.87.

17. Petitioners did not establish that they had paid sales tax in North Carolina for the personal property shipped to Florida.

18. Petitioners did not establish that they paid the use tax in Florida for the personal property described in the bills of lading used to calculate the tax assessed.

19. Petitioners did not purchase the personal property through a charitable organization such as the Red Cross which was

afforded tax exemption after Hurricane Andrew to purchase furnishings for the storm's victims.

20. Petitioners did not establish that they are financially unable to pay the assessment.

#### CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings.

22. Section 212.05, Florida Statutes, provides, in part:

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, including the business of making mail order sales, or who rents or furnishes any of the things or services taxable under this chapter, or who stores for use or consumption in this state any item or article of tangible personal property as defined herein and who leases or rents such property within the state.

(1) For the exercise of such privilege, a tax is levied on each taxable transaction or incident, which tax is due and payable as follows:

\* \* \*

(b) At the rate of 6 percent of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed, or stored for use or consumption in this state.

23. Section 212.02, Florida Statutes, defines tangible property such that personal home furnishings are included. It must be presumed, and Petitioners admit, that the home furnishings brought into this state from North Carolina were intended for use and are used in this state.

24. Rule 12A-1.091, Florida Administrative Code, provides:

12A-1.091 Use Tax.

(1) The Florida Sales and Use Tax Act imposes a tax on the use, consumption, distribution, and storage for use or consumption in this state of tangible personal property purchased in such manner that the sales tax would not be applicable at the time of purchase.

(2)(a) The use tax applies to the use in this state of tangible personal property purchased outside Florida which would have been subject to the sales tax if purchased from a Florida dealer; provided, however, that it shall be presumed that tangible personal property used in other states, territories of the United States, or the District of Columbia for six (6) months or longer under conditions which would lawfully give rise to the taxing jurisdiction of another state, territory of the United States, or District of Columbia before being imported into this state was not purchased for use in this state. For purposes of the presumption set forth herein, it shall be necessary only that the tangible personal property was used under conditions which would allow such other state, territory of the United States, or District of Columbia to impose a sales or use tax on the sale or use of that property regardless of whether any such tax was actually imposed or paid.

(b) The rental or lease of tangible personal property which is used or stored in this state shall be taxable without regard to its prior use or tax paid on purchase outside this state.

(3) The provisions of the Florida Sales and Use Tax shall not apply to the use or consumption, or distribution or storage of tangible personal property for use or consumption in this state upon which a like tax equal to or greater than the amount due this state has been lawfully imposed and paid in another state, territory of the United States, or the District of Columbia before use tax payable to this state would otherwise have become due. If the amount of tax so lawfully imposed and paid in another state,

territory of the United States, or the District of Columbia is not equal to or greater than the amount of tax imposed by Chapter 212, F.S., then the person from whom the use tax is due shall pay to the Department of Revenue an amount sufficient to make the tax paid in the other state, territory of the United States, or the District of Columbia and in this state equal to the amount imposed by that Chapter.

(4) The use tax does not apply to any property of which the retail sale is specifically exempt from payment of the Florida sales tax. The two taxes, sales and use, stand as complements to each other, and taken together provide a uniform tax upon either the sale at retail or the use of all tangible personal property irrespective of where it may have been purchased.

(5) Every dealer who solicits business, either by direct representatives, indirect representatives or manufacturers' agents and by reason thereof receives orders for tangible personal property from consumers for use, consumption, distribution or storage for use or consumption in the state, shall collect the tax from the purchaser, and no action either in law or in equity on a sale or transaction as provided by terms of Chapter 212, F.S., may be had in this state by any such dealer unless it is affirmatively shown that the provisions of the law have been fully complied with.

(6) For self-accrual authorization, see Rule 12A-1.0911, F.A.C.

(7) Under Section 212.06(1), F.S., use tax is imposed upon the cost of tangible personal property imported into this state for use, consumption, distribution, or storage for use or consumption in this state, after it has come to rest and has become a part of the general mass of property in this state, subject to the provisions contained in Rule 12A-1.045.

(8) If tangible personal property is sent out of the state to be repaired and returned, the transaction is taxable. When tangible personal property is shipped into this state, repaired and shipped back to its owner in another state by common carrier or mail, the



amount charged for the repair is exempt.

(9) If items are purchased from a sales office in Florida and shipped direct to a Florida customer by a factory in another state, the transaction is taxable, whether the invoicing is handled by the factory or the Florida office.

(10) If a Florida manufacturer sells taxable merchandise to an unregistered out-of-state dealer, but delivers it to the out-of-state dealer's customer in Florida, he shall collect tax from the out-of-state dealer, who, being unregistered, is unable to furnish a resale certificate.

(11) Law and medical books, accounting manuals, tax service books with currently issued inserts and similar publications are taxable when purchased from out-of-state suppliers for delivery in Florida.

(12)(a) Any person who manufactures factory-built buildings out-of-state for his own use in the performance of a contract for the construction or improvement of real property in Florida shall pay tax at the time such building is imported into Florida. The tax shall only be computed on the cost price of the items used in the manufacture of the building.

(b) For the purpose of this subsection, "factory-built building" means a structure manufactured in a manufacturing facility for installation or erection as a finished building; "factory-built building" includes, but is not limited to, residential, commercial, institutional, storage, and industrial structures.

(13) Any person who has purchased at retail, used, consumed, distributed or stored for use or consumption in this state tangible personal property, admissions, communication services, or leased tangible personal property, or who has leased any real property, space or spaces in parking lots or garages for motor vehicles, hangar storage or tie down for aircraft, or docking or storage space or spaces for boats in boat docks or marinas, and cannot prove that the tax levied by Chapter 212, F.S., has been paid to his vendor or lessor shall be directly liable to

the state for any tax, interest, or penalty due on any such taxable transactions.

(14)(a) Any person, whether registered or unregistered, who has purchased or leased tangible personal property either in this state or from out-of-state for use, consumption, or distribution, or for storage to be used or consumed in this state without having paid sales tax on such property if subject to tax, is required to remit use tax on the cost price and on the lease of such property. If such person is registered, use tax is to be remitted with the dealer's sales and use tax return. If such person is unregistered, use tax is to be remitted on Form DR-15MO, Mail Order/Use Tax Return (incorporated by reference in Rule 12A-1.097, F.A.C.), on or before the 20th day of the first month after the end of the calendar quarter during which any such property first came to rest and became a part of the general mass of property in this state. In those cases where the 20th day falls on Saturday, Sunday, or a federal or state legal holiday, returns shall be accepted as timely if postmarked or delivered to the Department of Revenue on the next succeeding day which is not a Saturday, Sunday, or legal holiday.

(b) Any person required to file and remit use tax on Form DR-15MO is not considered, by virtue of that fact alone, as "engaged in or conducting business in this state as a dealer," within the meaning of section 212.18(3), F.S., and is not required to file an application for a certificate of registration.

(c) Any person required to file and remit use tax on Form DR-15MO is not entitled to a collection allowance on account of keeping required records and accounting and remitting of taxes as required.

(d) Any person required to file and remit use tax on Form DR-15MO is not required to remit local option surtaxes on property purchased in a mail order sale.

(15) The use tax applies to promotional materials, as defined in s. 212.06(11)(b), F.S., including mail order sales as defined in s. 212.0596, F.S. After July 1, 1992, an exemption is provided on promotional

materials which are subsequently exported outside this state through a refund of previously paid taxes or by the dealer self-accruing taxes as provided in Rule 12A-1.0911, F.A.C. While a dealer purchasing and distributing the promotional materials and the seller of the promoted subscriptions to publications are not required to be the same person, the exemption only applies when the seller of promoted subscriptions to publications sold in this state is a registered dealer and is remitting sales tax to the Department on publications sold in this state. See Rule 12A-1.034, F.A.C., to obtain a refund of tax previously paid on promotional materials.

(16) For use tax on services taxable under Part I, Chapter 212, F.S., see Rule 12A-1.0161, F.A.C.

25. In this case the Department has established its entitlement to the amounts claimed under the challenged assessment. Petitioners have not paid the assessment nor presented any legal justification for why the assessment should not stand. Regrettably, Hurricane Andrew caused Petitioners to suffer a tremendous loss. That they were required to replace their home furnishings after the devastation has not been disputed by the Department. It is undoubted that they incurred a significant financial burden as a result of the storm. Such personal loss and tragedy does not, however, eliminate the obligations set forth in Chapter 212, Florida Statutes, regarding the imposition of a use tax.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Revenue enter a final order affirming the assessment in this cause.

DONE AND ENTERED this 5th day of August, 1997, in Tallahassee, Leon County, Florida.

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J. D. PARRISH  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
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this 5th day of August, 1997.

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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.