

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NICK AND SUE FARAH, d/b/a)
FARAH GAZEBO RESTAURANT,)
)
Petitioners,)
)
vs.) Case No. 96-5977
)
DEPARTMENT OF REVENUE,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Upon due notice, this cause came on for formal hearing on February 24, 1998, in Gainesville, Florida, before Ella Jane P. Davis, a duly assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Jeffrey R. Dollinger, Esquire
Scruggs & Carmichael, P.A.
1 Southeast 1st Avenue
Gainesville, Florida 32601

For Respondent: Elizabeth T. Bradshaw
Assistant Attorney General
Office of the Attorney General
The Capitol, Tax Section
Tallahassee, Florida 32399-1050

STATEMENT OF THE ISSUE

Whether Petitioner, Nick Farah, Sr., is liable for the taxes assessed under Chapter 212, Florida Statutes, for the March 1, 1989 - February 28, 1994 audit period, and to what degree, if any, the audit debt may be compromised as uncollectible.

PRELIMINARY STATEMENT

This case involves an assessment of sales taxes and charter transit system surtaxes associated with audit number 9501539 for the audit period of March 1, 1989 - February 28, 1994.

Any timeliness and scope of issue questions originally raised were waived or compromised by the prehearing stipulation or the admission of evidence without objection. The prehearing stipulation was thorough and included many agreed material facts. It was filed on February 6, 1998. It has been utilized extensively within the body of the recommended order, but repetitious material has been eliminated, details have been amplified based on the record, and there have been grammatical changes and rearrangement of material.

Petitioners presented the oral testimony of Nick Farah, Sr., Sue Farah, and Donald Ritchie. They had four exhibits admitted in evidence.

The Department of Revenue presented the oral testimony of Donald Ritchie, and had two composite exhibits admitted in evidence.

A transcript of testimony and proceedings was filed on March 12, 1998. After extensions of time, the parties each filed their respective proposed recommended orders on April 2, 1998. At the request of the undersigned, an agreed Notice of Filing

statutory and rule provisions applicable to the audit period was filed April 7, 1998.

FINDINGS OF FACT

1. This case involves an assessment of sales taxes and charter transit system surtaxes associated with audit number 9501539, and covering the audit period of March 1, 1989, to February 28, 1994 (audit period), for Farah's Gazebo Restaurant (the restaurant) located at 3541 University Boulevard, North, Jacksonville, Florida.

2. Sales of food and alcoholic beverages were made at the restaurant during the audit period. Sales tax was collected and remitted to the Department on the sales of alcoholic beverages during the audit period, but not on the sales of prepared food.

3. The assessment relates to the sale of food during the audit period.

4. The restaurant was first opened as a sandwich shop in 1974 by both Petitioners, Nick Farah, Sr., and Sue Farah, who at all times material have been husband and wife. Mrs. Farah's middle initial is "N." Mr. Farah is now 74 years old. Mrs. Farah is 63.

5. When the restaurant was opened in 1974, Nick Farah, Sr., opened a utility account with the City of Jacksonville in his name alone. At all times material, that same account in Nick

Farah, Sr.'s name has been used by the restaurant.

6. At all times material, Nick Farah, Sr., and Sue Farah had a checking account (number 467835202-01), in the name "Nick Farah d/b/a Farah's Gazebo Cafe, Restaurant & Lounge" with American National Bank of Florida (American National checking account). During the audit period, this account was used by Petitioners as both the restaurant's checking account and their personal checking account.

7. During the audit period, all proceeds from sales at the restaurant were deposited into the American National checking account. All of the Petitioners' personal living expenses were paid from monies deposited into the American National checking account.

8. During the audit period, Nick Farah, Sr., ran banking and shopping errands for the restaurant at his wife's direction, and considered it appropriate to write checks on behalf of the restaurant in his wife's absence.

9. When their restaurant was first opened, Petitioners obtained a sales tax registration certificate from the Department of Revenue. This certificate was issued in the names of both Petitioners.

10. In 1986, Petitioners refurbished and expanded their sandwich shop to a full restaurant serving dinner along with alcoholic beverages.

11. During the several months in which the restaurant was

being expanded, the restaurant was closed for business.

12. Petitioners have a son, Nick Farah, Jr., who has a restaurant and lounge in Gainesville, Florida.

13. Nick Farah, Jr., helped his parents expand their restaurant and donated certain restaurant equipment for the expansion.

14. In 1986, Nick Farah, Jr., obtained alcoholic beverage license 26-02438SRX solely in his name for the restaurant.

15. In 1988, Petitioners' other son, John Farah, became actively involved with the operation of the restaurant, in order to allow his father, Nick Farah, Sr., to retire. John Farah's involvement with the restaurant lasted approximately six or seven months, after which he was no longer involved.

16. In 1988, due to numerous medical problems, including high blood pressure, prostate cancer, diabetes, and weak eyes, Nick Farah, Sr., "retired." He advised the social security office in 1988 of his retirement and filed all necessary papers in order to begin to receive his social security benefits. His social security income was "direct deposited" to a Barnett Bank account set up solely for that purpose.

17. Nick Farah, Sr., listed himself as "retired" on the couple's joint 1989-1994 federal income tax returns. These returns include Schedule C, "Profit or Loss from Business," and listed the restaurant as solely owned by Sue Farah, as proprietor. On these returns, Sue Farah stated that she was sole

owner of the business known as Farah's Gazebo Restaurant.

18. When Nick Farah, Sr., retired, Sue Farah began paying bills and making all executive decisions concerning employees, doing the ordering, deciding on the menu, and pricing. However, since 1988, the restaurant also has had a manager who has dealt with the employees and food ordering as well.

19. Although he considers himself retired, Nick Farah, Sr., consistently has gone to the restaurant to eat, talk with friends, and play rummy. He has also performed errands and written checks for the restaurant. (See Finding of Fact 8) In testimony, he referred to the American National account as "our Gazebo account." (TR-111)

20. Sales Tax Registration Certificate No. 26-08-093045-08/1 was issued in the name of Nick Farah, Sr., Sue N. Farah, and Nick Farah, Jr., until June 1, 1992.

21. On June 1, 1992, Sales Tax Registration Certificate No. 26-08-126824-08/1 was issued in the names of Nick Farah, Sr., and Sue N. Farah. This was done to separate the restaurant from Nick Farah, Jr.'s, Gainesville restaurant. The type of business organization listed on the certificate is "partnership."

22. On each of the sales tax registration certificates, Nick Farah, Sr.'s social security number was used as the federal identification number.

23. In 1993, the Alcoholic Beverage License was renewed in the names of Nick Farah, Sr., and Sue Farah.

24. Petitioners' personal residence is held jointly in their names. During the audit period, Petitioners refinanced their personal residence and obtained a home equity loan through American National Bank. The proceeds from this loan were used to pay expenses related to the restaurant. (See Finding of Fact 52).

25. On March 24, 1994, the Department issued its DR-840 Notice of Intent to Audit Books and Records to "Nick & Sue Farah d/b/a Farah Gazebo Restaurant." Notices of Intent are usually issued in the name(s) on the current Sales Tax Registration Certificate.

26. On April 14, 1994, the Farahs both executed a Power of Attorney appointing their attorney to represent them in matters relating to the audit.

27. Subsequent to the audit, the Department issued its "Notice of Intent to Make Sales & Use Tax Audit Changes," under Chapter 212, Florida Statutes, on November 4, 1994, in the names of "Nick & Sue Farah d/b/a Farah Gazebo Restaurant." Taxes for the audit period March 1, 1989 - February 28, 1994, were assessed in the amount of \$65,093.44. Penalties were assessed up to that point in time in the amount of \$20,679.43. Interest was assessed up to that point in time in the amount of \$22,678.86. The total was \$108,451.73. Interest would continue to run.

28. Also on November 4, 1994, the Department issued its

"Notice of Intent to Make Charter County Transit System Surtax Changes" in the names of "Nick & Sue Farah d/b/a Farah Gazebo Restaurant." Taxes were assessed in the amount of \$5,424.46; penalties were assessed in the amount of \$1,723.27; and interest was assessed in the amount of \$1,889.92 for a total of \$9,037.65.

29. The Department revised its audit on January 17, 1995. Two revised Notices of Intent were issued, each in the names of "Nick & Sue Farah d/b/a Farah Gazebo Restaurant," with assessment in the following amounts: \$62,974.40 (sales and use taxes), \$19,839.95 (penalties), and \$28,373.14 (interest); and \$5,247.86 (charter county surtaxes), \$1,653.29 (penalties), and \$2,367.18 (interest). These revised notices were issued to reflect the deduction of certain non-revenue items from the gross deposits reflected on the Petitioners' bank statement. They also show accruing interest.

30. By their attorney's letter dated February 6, 1995, Petitioners raised the issue of Nick Farah, Sr.'s liability for the assessment, arguing that his involvement with the restaurant during the audit period was insufficient to render him a "taxpayer" as contemplated by the applicable statutes and rules, and insufficient to create such a tax liability for him.

31. The letter from Petitioners' counsel stated that Petitioner Sue Farah "considered the restaurant to be hers, and has filed her federal income tax returns accordingly. She is

willing to sign the Notice of Intent and enter into a payment arrangement."

32. Donald Ritchie, the Department's Jacksonville tax auditor who had initiated the audit, subsequently issued a "Memo to File," dated February 7, 1995, stating,

Auditor contacted atty. Jeff Dollinger in response to his letter of 2-6-95 in which he states TP's claim that Sue Farah is sole proprietor of restaurant and Nick is not a "dealer" in connection with the restaurant operation. He stated in a telephone conversation that Sue Farah wished to sign NOI indicating agreement with the proposed audit changes "with the exception of penalty" and obtain a stipulated payment schedule but only if registration and audit were changed to eliminate Nick's name.

33. On February 7 and 8, 1995, Peggy Bowen, a Departmental superior of Mr. Ritchie, directed two memoranda by electronic mail (e-mail) to another Departmental employee, Allen Adams, located in Tallahassee. These memoranda requested guidance on how to proceed with the questions raised by Petitioners' counsel.

34. In response to these requests, a series of e-mail memoranda were exchanged within the Tallahassee office of the Department. The first, on February 8, 1995, from George Stinson, stated, in part:

What advantage would we have if we assessed "Nick's Partnership"? . . . from what Peggy said, "Nick's Partnership" doesn't even exist, but "Sue's Sole Proprietorship" does. It seems to me that it would be absurd to assess an entity ("Nick's Partnership") that, by the taxpayer's own admission, doesn't exist. Just because the registration social data on the database is erroneous doesn't

mean we should issue an erroneous assessment.

35. The second February 8, 1995, electronic mail memorandum from Allen Adams to Peggy Bowen, stated, "OK, I take this as an approval to change our NOI and get an agreed case."

36. The final electronic mail memorandum dated February 9, 1995, from George Stinson to Allen Adams provides:

Allen...While mulling this all over in my brain, it occurred to me it would not be unwise for Peggy to prepare (but hold on to for the time being) an NOI under "Nick's Partnership" in case the other one somehow goes awry. If "Sue's Sole Proprietorship" [sic] tries to pull a "fast one" and renege on their agreement and stip because they claim they weren't the "registered" or "840'd" entity, we can file off the other one to make sure all bases are covered. If the TP seems to be dragging their feet and we're getting into a jeopardy situation, we could even have both NOI's (and assessments) in existence concurrently to keep us protected.

37. Donald Ritchie testified that he did not know of the existence of a "Nick's Partnership" or where such a term came from. However, see Findings of Fact 21, 25, and 46.

38. A memo to file was subsequently produced by Peggy Bowen, dated February 10, 1995, which stated in part:

I spoke to Allen Adams on the telephone regarding the memo from George Stinson dated 2/9/95. We agreed that our procedure would be to revise the existing NOI which is in the name Nick and Sue Farah to Sue Farah, and correct the SSN, under the existing audit number. We issued the existing NOI as a sole proprietorship, as Nick & Sue Farah, and we are only clarifying the name of the sole proprietorship to Sue Farah. There were not any partnership federal tax returns filed only joint 1040.

39. Neither Petitioner was privy to the internal e-mail memoranda of the Department.

40. The parties have stipulated that the Department agreed to remove Nick Farah, Sr.'s name from the Notices of Intent in exchange for Sue Farah's agreement to sign the notices as "agreed" liabilities. Accordingly, the Department's Second Revised Notices of Intent were issued on February 13, 1995.

41. The Second Revised Notices of Intent were issued in the name "Sue Farah d/b/a Farah Gazebo Restaurant." These were issued by Donald Ritchie¹

42. The Second Revised Notice of Intent to make Sales and Use Tax Audit Changes (also referred to as "the second NOI") states in paragraph #1, "The Department of Revenue presents you with a Notice of Intent to make Sales and Use Tax Audit Changes for the period of time which you have been found to be liable on various transactions subject to the tax under Chapter 212, Florida Statutes, during the period 03/01/89 Through 02/28/94." It further states on the bottom of the first page, "NOTE: The execution and filing of this waiver will expedite adjustment of the tax liability as indicated above. . . . If you now agree with the tax audit changes, please sign this form and return it to the audit office indicated above."

43. Petitioner Sue Farah signed the Second Revised Notices of Intent on March 10, 1995.

44. Also on March 10, 1995, Petitioner Sue Farah submitted a request for compromise of taxes, penalties, and interest.

45. The Department's representative in Jacksonville agreed to waive the penalties on the assessment. Subsequently, the Department's auditor forwarded the audit file to Tallahassee for further consideration of the Request for Compromise of Taxes and Interest.

46. Donald Ritchie testified that during the course of the audit, it was apparent to him that it was an operation that was owned and operated by a husband and wife, Nick Farah, Sr., and Sue Farah, but that a Notice of Intent is issued in the name of the taxpayer as it is listed on the sales tax registration. It is noted, however, that the audit period covered a period in which there were two sales tax registration numbers for the restaurant in the name(s) first of Nick, Sr., Sue and Nick, Jr., until June 1, 1992, and thereafter as Nick Farah, Sr. and Sue Farah, a partnership. (See Findings of Fact 20-21.)

47. After the audit was conducted, the audit file was forwarded to Tallahassee for review. Included within the audit file was the Standard Audit Program & Report for Sales and Use Tax form. Donald Ritchie testified that he filled out the Standard Audit Program & Report for Sales and Use Tax form listing the taxpayers as "Nick & Sue Farah d/b/a Farah's Gazebo Restaurant," and indicating that the entity was a "sole proprietorship" because he understood that a business entity run

by a husband and wife did not constitute a partnership but rather a sole proprietorship in the absence of the formal procedures of organizing a partnership.

48. Donald Ritchie further testified that he forwarded the file to Tallahassee as an "unagreed audit," because after signing the second NOI the Petitioners had asked for "additional conditions," including a request by Sue Farah for compromise of the taxes, penalties, and interest, that had not been specified at the time Sue Farah signed. However, he conceded that anyone signing an NOI could request such compromise. It is also clear that Sue Farah had always retained the right to compromise the penalties. (See Findings of Fact 30, 32 and 44-45)

49. The Department subsequently issued its Notices of Proposed Assessment (NOPA) on September 6, 1995, in the names of both husband and wife, as "Nick & Sue Farah/Farah Gazebo Restaurant."

50. By letter dated November 3, 1995, Petitioner Sue Farah d/b/a Farah Gazebo Restaurant protested the entire proposed assessments, on the ground of "doubt as to collectability."

51. By letter dated January 15, 1996, Petitioner Sue Farah submitted her financial information in support of her protest.

52. Petitioners had borrowed additional monies in order to pay off general debts and debt associated with the restaurant involved in this proceeding. They then borrowed again in order to open a second restaurant on "Mandarin" in Jacksonville. This

new venture was to be run by a newly created corporation, of which Sue Farah is sole stockholder. Petitioners are agreed that if the restaurant which is at issue in this cause were sold, Sue Farah would get all the proceeds.

53. By letter dated March 15, 1996, Kathleen Marsh, CPA and Tax Law Specialist for the Department, requested certain financial information from both Petitioners in order to consider the issues raised in the letter of protest, including but not limited to, audit papers, bank statements for the years 1995 and 1996, and various information relating to the operation and financial position of the second restaurant.

54. By letter dated April 8, 1996, Kathleen Marsh notified Petitioners that she had not yet received the information she had requested, and was going to issue the Notice of Decision.

55. By letter dated April 17, 1996, Petitioners' CPA responded in part to the Department's request for additional financial information, but it does not amount to a certification or audit of the Farahs' financial statements.

56. Also on April 17, 1996, the Department issued its Notice of Decision, sustaining the assessment in its entirety, determining that doubt as to collectability had not been established by the Petitioners.

57. The Petitioners sought reconsideration of the Department's determination, raising the additional argument that Nick Farah, Sr., was not sufficiently involved in the operation

of the restaurant during the audit period so as to be liable for the tax assessment.

58. The following information had been requested by the Department but was never received from the Petitioners: a copy of an IRS audit, bank statements for all accounts for the years 1995 and 1996, information relating to ownership of stock in the new restaurant corporation, and information relating to sales tax registration for the new restaurant.

59. The Department issued its Notice of Reconsideration on November 5, 1996, again sustaining the assessment in its entirety and determining that doubt as to collectability still had not been established. It further determined that Nick Farah, Sr., was a registered dealer under Chapter 212, Florida Statutes, and was otherwise sufficiently involved in the operation of the restaurant so as to be liable for the assessment.

60. Petitioners timely filed their Petition for this administrative hearing under Chapter 120, Florida Statutes.

61. Petitioners agreed that the amount of the tax assessed by the Department is correct.

62. Since the offer of compromise, several properties owned either jointly by husband and wife or owned solely by Nick Farah, Sr., have been foreclosed. Otherwise, the sworn financial statements in the audit file have been adopted by the Petitioners' testimony as still accurate. None of these financial statements bear a certification by a certified public

accountant.

63. Neither Mr. nor Mrs. Farah's financial situation has remained static in the ensuing two years.

64. Sue Farah still desires to compromise the total tax bill with small monthly payments, but she could not articulate an amount she can currently pay and relied on her earlier offer.

CONCLUSIONS OF LAW

65. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause, pursuant to Sections 120.57(1) and 120.80(14), Florida Statutes.

66. Petitioner Sue Farah has agreed that the amount of sales and charter county surtaxes was correctly assessed by the Department and has further agreed to her liability for the assessed taxes.

67. Left to be determined in this case is: (1) Was Nick Farah, Sr., obligated to collect and remit sales taxes during the audit period? (2) If Nick Farah, Sr., was a "taxpayer" during the audit period, was his liability waived by the Department at any point so that the Department is now estopped or otherwise precluded from proceeding against him for collection? and (3) Is the Department obligated to compromise the amount assessed against Nick Farah, Sr., and/or Sue Farah on the basis of uncollectability?

68. Section 212.05, Florida Statutes provides that

"every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this state. . ."

69. Section 212.06(1)(a), Florida Statutes provides,

"the aforesaid tax at the rate of six percent of the retail sales prices as of the moment of sale . . . shall be collectable from all dealers as herein defined on the sale at retail . . ."

70. In return for the privilege of engaging in business in this state, the general sales tax statutes require retailers to collect and remit certain taxes. See Cash v. State, 628 So. 2d 1100 (Fla. 1993).

71. Section 212.18(3)(a), Florida Statutes provides,

every person desiring to engage in or conduct business in this state as a dealer, as defined in this chapter . . . must file with the Department an application for a certificate of registration for each place of business, showing the names of the persons who have interest in such business . . .

72. The evidence demonstrates that at the time the Farahs originally opened their sandwich shop in 1974, they were both involved in its operation. At that time, both Petitioners were registered with the Department as dealers for purposes of collecting and remitting sales taxes.

73. The evidence also demonstrates that at several times over the course of the years before and during the audit period, Petitioners applied for new sales tax certificate registration numbers, including applications filed in 1986 and 1992. At all times, Nick Farah, Sr.'s name was included on the registration

applications and his social security number was listed. Moreover, the 1992 registration certificate was filled out to reflect that the restaurant was operated as a "partnership" between Nick Farah, Sr., and Sue Farah, his wife. Finally, it was not until after the audit period that Nick Farah, Sr.'s name was removed from the registration certificate for the restaurant.

74. Nick Farah, Sr., testified that he retired for purposes of social security benefits, in 1988. At that time, he filled out the necessary paperwork for the federal Social Security Administration to begin collecting his social security benefits.

75. However, no new sales tax registration certificate was submitted by the Petitioners to the Department of Revenue in 1988 to reflect any change in the ownership of the restaurant or to reflect how profits would be dispersed from the restaurant or to release Nick Farah, Sr., from responsibility for sales taxes arising from operation of the restaurant.

76. Nick Farah, Sr.'s registration as a "dealer" with the Department created an obligation for him under Chapter 212, Florida Statutes, to collect and remit the appropriate sales taxes on sales made at the restaurant, regardless of his situation with federal social security, which is based on "employment" not profits from investment in a business. To the extent those sales taxes were not collected and remitted, Nick Farah, Sr., bore as much liability as did Sue Farah. See Sections 212.05, 212.06(1)(a), and 212.06(2), Florida Statutes.

77. In addition to his registration as a dealer under Chapter 212, Florida Statutes, other considerations support the conclusion that Nick Farah, Sr., was a de facto partner in the business during the audit period, and was liable for the sales taxes that should have been collected at the restaurant during that period. This involvement is demonstrated by the name on the Alcoholic Beverage License, by co-mingling of funds and by the joint checking account upon which Nick Farah, Sr., could write both personal checks and checks for the restaurant. Likewise, his performing minor duties for the restaurant indicates some involvement.

78. Under Section 620.59(4), the receipt by a person of a share of the profits of a business is prima facie evidence that the person is a partner in the business. In this case, Nick Farah, Sr., testified that the small profit reflected on the tax returns for each year of the audit period was deposited into the parties' joint checking account, and used with other monies to pay their personal expenses. In addition, Nick Farah, Sr., testified that he was available to run errands and write checks on behalf of the restaurant as needed by his wife, even after 1988. The financial benefit that Nick Farah, Sr., was enjoying from the restaurant herein bespeaks more of a partnership than it does of a spouse benefiting only derivatively from an income or profit that belongs solely to the wage-earner spouse.

Accordingly, the business continued to be operated as a partnership even after Nick Farah's "retirement" in 1988.

79. Having determined that Nick Farah, Sr., was liable for the taxes of the audit period on the basis of his continued registration for sales tax purposes and his involvement in the restaurant, inquiry must then pass to whether or not the Department is estopped or otherwise precluded from proceeding against him for collection.

80. The Department now asserts in its Proposed Recommended Order that all that occurred here was that during the process of finalizing the audit in the field, the parties could not come to terms on a final agreement by which Sue Farah would pay the assessed liability without further contesting it. That is not what the facts show.

81. Rather, the facts show that the Department of Revenue breached its agreement with Sue Farah which had provided that if the Department would remove Nick Farah, Sr., from the audit, Sue Farah would sign the Second Revised Notices of Intent. The parties specifically stipulated herein that

The Department agreed to remove Nick Farah, Sr.'s name from the Notices of Intent in exchange for Sue Farah's agreement to sign the notices as "agreed" liabilities. Accordingly, the Department's Second Revised Notice of Intent were issued on February 13, 1995. . . . Petitioner Sue Farah signed the Second Revised Notice of Intent on March 10, 1995." (See Findings of Fact 40, 43)

Because the Department of Revenue removed Nick Farah, Sr., from

the audit and Mrs. Farah then signed the Notice of Intent, the Department breached the agreement by once again declaring Mr. Farah to be a taxpayer liable for the tax imposed by the audit.

82. Herein, the Department made an agreement with Sue Farah that if the Department removed Nick Farah, Sr., from the audit, Sue Farah would sign the Second Revised Notices of Intent, acknowledging her sole liability and agreeing not to contest the amounts assessed, except penalties. The Department of Revenue prepared the NOI in Sue Farah's name solely, and Sue Farah signed. (See Findings of Fact 39-43) There was Departmental authority or apparent authority in the NOI as prepared, and there was no way Nick Farah, Sr., or Sue Farah could have known that Departmental personnel had planned, by secret e-mail, to "fudge-factor" with two different NOIs if Sue Farah did not pay up the entire agreed amount. It is clear from the internal e-mail that Departmental personnel had "doubt as to the liability" of Nick Farah, Sr., and thought there was a real chance that they could not establish any tax liability in Nick Farah, Sr. To reach an agreed amount and avoid time-consuming negotiation and potentially unsuccessful litigation, the Department waived any entitlements against Nick Farah, Sr. Mrs. Farah's signature waived her right to assert her own lack of liability for all taxes and her right to dispute the amounts assessed (except penalties). The agreement benefited the Department in not having

to "prove up" the audit calculations or amounts or Mrs. Farah's liability. Offer and acceptance of this compromise, under the circumstances of this case, precludes the Department from then going back after Nick Farah, Sr.

83. In its Proposed Recommended Order, the Department seems to be saying that it would have considered itself bound by the Second Revised Notices of Intent signed by Sue Farah alone, not to go against Nick Farah, Sr., as a taxpayer, but for Sue Farah subsequently attempting to compromise the amount of taxes owed. While the Department claims further negotiation over the amount constituted Sue Farah's attempt to avoid liability for the full amount, the Farahs have argued that in signing the Second Revised Notices of Intent, Sue Farah was only agreeing to be solely liable (i.e., without any liability attaching to Nick Farah, Sr.) for the taxes and she still considered herself to have the right that any other taxpayer has to seek to compromise the agreed amount or "damages" aspect, on the basis of collectability. In other words, Sue Farah agreed she owed the full amount, except penalties, but not that she could pay the full amount with or without penalties.

84. I note that Section 213.21(3)(a), Florida Statutes, also makes a distinction between "doubt as to liability for . . . such tax or interest" and "doubt as to . . . collectability of such tax or interest." (Emphasis supplied,) (See full statutory text below.) Based on the statute and the respective dealings,

responsibilities, and leverage of the parties, I am satisfied that Sue Farah's position is the more reasonable one.²

85. Herein, Petitioners have not challenged the correctness of the Department's calculations of the amount of taxes owed. They have not challenged the legal basis for the assessment. Due to the signature of Sue Farah on the NOI and the determination herein that the Department must accept that Sue Farah bears sole liability for the taxes in this cause, liability for the taxes is no longer at issue. Sue Farah remains liable for the entire amount of the taxes, penalties, and accruing interest.

86. Having now determined that the Department is precluded from attempting to collect from Nick Farah, Sr., it is necessary to address the final issue of whether or not the amount Sue Farah alone owes should be compromised based on uncollectability.

87. Under Section 212.21(3)(a), Florida Statutes, it is within the Department's discretion to compromise an assessment of sales taxes and interest, as well as an assessment of penalties. Its discretion, however, is limited to those situations in which there is "doubt as to liability for . . . such tax or interest," or where there is "doubt as to . . . collectability of such tax or interest." Penalties may be compromised if non-compliance resulted from reasonable cause and not from willful negligence, willful neglect, or fraud.

88. Section 213.21(3)(a), Florida Statutes, provides:

A taxpayer's liability for any tax or interest specified in s. 72.011(1) may be

compromised by the Department upon the grounds of doubt as to liability for or collectability of such tax or interest. A taxpayer's liability for penalties under any of the chapters specified in s. 72.011(1) may be settled or compromised if it is determined by the Department that the non-compliance is due to reasonable cause and not to willful negligence, willful neglect, or fraud.

89. Rule 12-13.003(2), Florida Administrative Code, provides that in order for a taxpayer to establish doubt as to the collectability of taxes or interest, such taxpayer must demonstrate uncollectability "to the satisfaction of the Department by audited financial statements or other suitable evidence acceptable to the Department." (Emphasis supplied,)

90. Rule 12-13.006, Florida Administrative Code, further provides:

Tax or interest may be compromised or settled on the grounds of "doubt as to collectability" when it is determined that the financial status of the taxpayer is such that it is in the best interest of the State to settle or compromise the matter because full payment of the tax obligation is highly doubtful and there appears to be an advantage in having the case permanently and conclusively closed.

91. At the time Petitioners initially raised the collectability issue, they failed to submit financial information to the Department which, within the Department's expertise, was deemed necessary to support the request for compromise. Without being able to determine the Petitioners' true financial condition, the Department was unable to find that the Petitioners had established doubt as to collectability. Accordingly, on that

basis, the Department was within the discretion imposed on it by statute to initially deny a compromise based on non-collectability. However, the Department's ultimate denial of compromise was based, in part, on its belief that Nick Farah, Sr., was liable for the taxes, an issue which has now been resolved against the Department. Moreover, nearly two years have passed since the Notice of Reconsideration, and testimony herein shows that the Farahs' financial situation had changed significantly as of the date of formal hearing.

92. Petitioners raised the issue of collectability vel non in this de novo proceeding, and herein the burden is upon Petitioners to demonstrate that as of the date of formal hearing it is in the best interest of the State to settle or compromise with Sue Farah because full payment of her tax obligation is currently highly doubtful and there appears to be an advantage (to the State) in having the case permanently and conclusively closed.

93. The undersigned has reviewed the record herein at length and concludes, on the basis of all the evidence, that although there is no showing of fraud, penalties cannot be waived due to the absence of proof of reasonable cause for not collecting the sales tax in the first place. See Section 213.21(3)(a), Florida Statutes.

94. Petitioners also have failed to present sufficient

evidence to support a compromise and payment schedule of the entire tax debt. There appear to be no current audited financial statements in evidence. The evidence also affirmatively shows that Sue Farah controls two restaurants. Her current income and assets are not clear. There is no evidence that the best interests of the State will be served by a compromise of the amounts. See Sections 213.21(3)(a), Florida Statutes, and Rules 12-13.003(2) and 12-13.006, Florida Administrative Code.

RECOMMENDATION

Upon the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that a Final Order be entered by the Department of Revenue that:

(1) Assesses the entire liability for the March 1, 1989 - February 28, 1994, audit period against Sue Farah for the taxes, penalties, and accruing interest;

(2) Absolves Nick Farah, Sr., of any liability for the same audit period; and

(3) Denies all compromise of the amount(s) assessed.

DONE AND ENTERED this 10th day of June, 1998, in
Tallahassee, Leon County, Florida.

ELLA JANE P. DAVIS
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847

Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of June, 1998.

ENDNOTES

^{1/} Mr. Ritchie further testified that there is "no requirement for the taxpayer to sign the NOI in order to support an NOPA because the . . . signature on the NOI shows agreement by the taxpayer. There is no agreement required to issue the NOPA," and that a taxpayer's signature on the NOI only means that the taxpayer has agreed to be audited; if a taxpayer does not sign the NOI, the file "goes to Tallahassee for issuance of the Notice of Proposed Assessment," and that, "as a matter of routine," if a taxpayer signs an NOI, then the NOPA is issued in the same name as the NOI. However, due to the parties' stipulation that the Department agreed to remove Nick Farah, Sr.'s name from the Notices of Intent in order to get Sue Farah to sign the Notices as "agreed" liabilities, Mr. Ritchie's evidence of what "usually" happens with signed or unsigned Notices of Intent is not found as fact or concluded as law.

^{2/} The four elements of estoppel are that there was a material fact that is contrary to a later-asserted position; reliance on that representation; and a change in position detrimental to a party claiming estoppel, caused by representation and reliance thereon. State Department of Revenue v. Anderson, 403 So. 2d 397 (Fla. 1981). Even so, it appears that there must be a positive act by an official of the State, made in writing, that is relied upon, before estoppel will lie against the sovereign. State Department of Health and Rehabilitative Services v. Law Offices of Donald W. Belveal, 663 So. 2d 650 (Fla. 2nd DCA 1995). Indeed, estoppel is applied against the State in only the rarest

circumstances but may occur. Alachua County v. Cheshire, 603 So. 2d 1334 (Fla. 1st DCA 1992). Herein, Petitioners have proven all four elements and even that the State employees with apparent authority to make the representation did so in writing. Alternatively, and notwithstanding the very different situation of Jacksonville Electric Authority v. Draper's Egg and Poultry, 557 So. 2d 1357 (Fla. 1990), the circumstances herein lend themselves to a conclusion that an agreement to compromise certain elements of the case (amount and sole liability in Sue) was reached. By either legal theory, Sue Farah's argument must prevail.

COPIES FURNISHED:

Jeffrey R. Dollinger, Esquire
SCRUGG & CARMICHAEL, P.A.
Post Office Box 23109
Gainesville, Florida 32602

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

Joseph Mellichamp, III, Esquire
Elizabeth T. Bradshaw, Esquire
Albert Wollermann, Esquire
Department of Legal Affairs
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

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

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.