

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

GRIFFIN'S CARPET MART, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 98-5654
	)	
DEPARTMENT OF REVENUE,	)	
	)	
Respondent.	)	
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RECOMMENDED ORDER

Upon due notice, William R. Cave, an Administrative Law Judge for the Division of Administrative Hearings, held a formal hearing in this matter on January 18, 2000, Tallahassee, Florida.

APPEARANCES

For Petitioner: James F. McCollum, Esquire  
Law Offices of James F. McCollum, P.A.  
129 South Commerce Avenue  
Sebring, Florida 33870-3698

For Respondent: John Mika, Esquire  
Nicholas Bykosky, Esquire  
Office of the Attorney General  
Department of Legal Affairs  
The Capitol, Tax Section  
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STATEMENT OF THE ISSUE

Is the purchase or use of tangible personal property by a contractor who purchases material and supplies for use in performing non-public works contracts taxable under Chapter 212, Florida Statutes, and Rule 12A-1.051, Florida Administrative Code?

PRELIMINARY STATEMENT

On October 26, 1998, the Department of Revenue (Department) issued its Notice of Decision to Petitioner Griffin's Carpet Mart, Inc. concerning the Department's Sales and Use Tax Audit Assessment of Petitioner's business covering the period from November 1, 1992 through October 31, 1997, which also included an assessment for Local Government Infrastructure Surtax. Among other things, the Notice of Decision advised Petitioner of its appeal rights. By letter dated December 18, 1998, and received by the Department's Agency Clerk on December 23, 1998, the Petitioner requested a formal hearing under Chapter 120, Florida Statutes. By letter dated December 29, 1998, the Department referred this matter to the Division of Administrative Hearings (Division) for the assignment of an Administrative Law Judge and for the conduct of a formal hearing.

At the hearing, Petitioner presented the testimony of John T. Griffin. The deposition of John T. Griffin taken August 20, 1999, was received in addition to his live testimony at the hearing. The depositions of Garth Winsor taken September 27, 1999, Robert Flores taken September 27, 1999, Randy Reimer taken September 27, 1999, Elizabeth Bosco Turner taken June 25, 1999, and Rose Chancey taken July 16, 1999, were received in lieu of their live testimony at the hearing. The deposition of John T.

Griffin is received subject to the objections to his testimony made by Griffin's counsel, which are sustained. The depositions of Rose Chancey and Elizabeth Bosco Turner are received subject to the objections to their testimony made by the Department's counsel, which are sustained. The Department presented the testimonies of Richard B. Turnbull and Jonathan E. Swift. The Department's Composite Exhibits numbered 1 and 2 and the Department's Exhibit numbered 3 were received in evidence. Sections 120.80(14), 212.02, 212.031, 212.05, 212.054, 212.06, 212.18 and 213.06, Florida Statutes, and Rules 12A-1.006, 12A-1.016, 12A-1.051, 12A-1.070, 12A-1.091, and 12A-15, Florida Administrative Code, were officially recognized.

Petitioner's Unopposed Motion to Allow Late Filing of Brief, which was treated as a Motion to Extend the Time for Filing Proposed Findings of Fact and Conclusions of Law, was granted with the understanding that any time constraint imposed under Rule 28-106.216(1), Florida Administrative Code was waived in accordance with Rule 28-106.216(2), Florida Administrative Code. The parties filed their Proposed Recommended Orders under the extended time frame.

#### FINDINGS OF FACT

Upon consideration of the oral and documentary evidence adduced at the hearing, the following relevant findings of fact are made.

1. Petitioner is a Florida Corporation having its principal place of business located at 560 Highway 27 North, Sebring, Florida 33820, and is subject to the taxes imposed under Chapter 212, Florida Statutes.

2. The Department is the agency authorized to administer the tax laws of the State of Florida, pursuant to Section 213.05, Florida Statutes.

3. The Department is authorized to prescribe the records to be kept by all persons subject to taxes under Chapter 212, Florida Statutes. Such persons have a duty to keep and preserve their records, and the records shall be open to examination by the Department or its authorized agents at all reasonable hours pursuant to Section 212.12(6), Florida Statutes.

4. The Department is authorized to conduct audits of taxpayers and to request information to ascertain their tax liability, if any, pursuant to Section 213.34, Florida Statutes.

5. The Department conducted an audit of Petitioner to determine if Petitioner was properly collecting and remitting sales and use tax to the Department.

6. The audit covers the period from November 1, 1992, through October 31, 1997.

7. Petitioner is a retail carpet store, selling carpet and other flooring material, both installed and non-installed, in Sebring, Florida, and the surrounding areas. An invoice is prepared for each sales transaction.

8. Petitioner rents the building in which its business is conducted and where Petitioner's inventory and supplies are stored. Petitioner pays rent monthly. During the audit period, tax was neither paid nor collected on the rent payments.

9. Petitioner purchases carpet samples from out-of-state vendors for use in its business. During the audit period, sales tax was not paid on all purchases.

10. Petitioner collected tax on the price of the carpet or other flooring materials, as reflected on the invoice, where the customer was a taxpaying entity and collected tax on the total price on the invoice when the invoice specified installation.

11. Petitioner did not collect tax on the price of the carpet or other flooring material, as reflected on the invoice, for tax-exempt entities, whether the invoice reflected the carpet or other flooring material as installed or non-installed.

12. On May 18, 1998, a Notice of Intent to Make Audit Changes was presented to Petitioner. Additional sales and use tax and infrastructure surtax were determined to be due for the following taxable events: (a) rental expenses; (b) taxable purchases of samples; and, (c) sales to tax-exempt entities where the sale of carpet or other flooring materials included installation to real property.

13. On May 18, 1998, Petitioner paid the additional tax assessed for taxable rental expenses and taxable purchases of samples and has been given credit for such payment.

14. Petitioner protests the tax assessed on the cost price of carpeting used where the customer was a tax-exempt entity and the sales price included installation.

15. On July 16, 1998, the Department sent to Petitioner its Notice of Proposed Assessment showing that Petitioner owed additional sales and use tax and infrastructure surtax in the amount of \$13,569.15 and \$2,188.01, respectively. Added to the tax owed by Petitioner were penalties in the amount of \$6,730.78 and \$1,085.02, respectively, and interest through July 16, 1998, in the amount of \$4,627.66 and \$736.95, respectively. The total assessment was \$24,927.59 and \$4,009.98, respectively. Credits in the amount of \$8,233.87 and \$1,372.30 respectively, have been applied against the taxes assessed and reflect the payments made by Petitioner on May 18, 1998.

16. The amount of taxable rental expenses reported on the audit work paper Schedule B010 is consistent with Petitioner's monthly reports.

17. The amount of taxable sample expenses reported on the audit work paper Schedule B020 is consistent with Petitioner's monthly reports.

18. The amount of exempt sales reported on the audit work paper Schedule B030 is consistent with Petitioner's monthly reports.

19. Petitioner timely filed a written protest of the Department's proposed assessment.

20. On October 25, 1998, the Department issued its Notice of Decision as to the protest of Petitioner. The proposed assessment was sustained by the Department.

21. All invoices in the Department's Composite Exhibit numbered 2, with the exception of invoices numbered 68, 197, 262, 432, 481, 482, 497, and 498, which are related to transactions that do not involve real property, are records of contracts between Petitioner and the tax-exempt entity to furnish and install wall-to-wall carpet or other flooring materials on real property. There is no retained title provision in any of these contracts.

22. With the exception of invoices numbered 68, 197, 262, 432, 481, 482, 497, and 498, the invoices contained in the Department's Composite Exhibit numbered 2 reflect an improvement being made to real property.

23. Each of the invoices in the Department's Composite Exhibit numbered 2 corresponds to a specific entry in Schedule B030 of the audit work papers and which is included under Tab 7a, pages 19 through 32, of the Department's Composite Exhibit numbered 1.

24. When Petitioner installed, or subcontracted the installation of carpet, the carpet was affixed to the floor by glue, nails, or other means and became the finished floor.

25. Although tack strips, glue, nails, seaming tape, and other items were not listed on the invoice, these items are

commonly used in the industry to complete performance of contracts such as those involved in this proceeding.

26. In providing for the installation of carpet or other flooring materials involved in this proceeding, Petitioner engaged subcontractors and paid the subcontractor by the square yard. The square yard price included all materials and labor. With some exceptions, such as metal strips, materials used in the installation of the carpet or other flooring materials were not reflected on the invoices.

27. Since there was no itemization of parts and labor, the invoices contained in the Department's Composite Exhibit numbered 2, with the exception of invoices numbered 68, 197, 262, 432, 481, 482, 497, and 498, are lump-sum contracts.

28. During his testimony at the hearing, John T. Griffin described Petitioner's invoices as lump-sum contracts.

29. Petitioner argued that the Department had failed to provide the proper information and training concerning the Department's position on the imposition of the tax. However, based on the testimony of the Department's witnesses concerning this matter it appears that sufficient information and sufficient training concerning the Department's position on the imposition of the tax was readily available to Petitioner or its employees.

30. The noncompliance by Petitioner with the applicable sales and use tax rules was not due to willful negligence, willful neglect, or fraud.



31. It is the recommendation of the Department's employees that the penalty assessed in this matter be waived.

32. As of January 18, 2000, the total sales and use tax, penalty, and interest was \$17,658.80. The local governmental infrastructure total surtax, penalty, and interest was \$2,786.58. These totals do not reflect a downward adjustment for the taxes, penalty, and interest assessed against invoices numbered 68, 197, 262, 432, 481, 482, 497, and 498. For these invoices, the adjustment for taxes assessed, penalty, and interest shall be calculated from the date of each specific invoice and Petitioner given credit for any taxes, penalty, or interest charged against it for invoices numbered 68, 197, 262, 432, 481, 482, 497, and 498.

33. The interest that has been assessed for the taxes that were not paid on the rent of the building or the carpet samples is appropriate. Petitioner does not disagree with this interest.

#### CONCLUSIONS OF LAW

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

35. In an administrative proceeding, such as this one, the Department's burden is limited to a showing that an assessment has been made against the taxpayer and the factual and legal grounds upon which the Department made the assessment. Section

120.80(14)(b)2, Florida Statutes. The Department has met its burden in this regard. The Department having met its burden, the burden of going forward shifts to Petitioner to demonstrate by a preponderance of the evidence that the assessment is incorrect.

36. Rule 12A-1-051(1),(2)(a)-(f),(3),(16), and (40), Florida Administrative Code, provides in part as follows:

(1) This rule shall govern the taxability of purchases or use of tangible personal property by contractors who purchase or manufacture materials and supplies for use in the performance of non public works contracts. . . . The method by which contractors or subcontractors arrive at the total contract price charged for repair, alteration, improvement, and construction of real property or for a combination of work on both real and personal property must be determined for the purpose of ascertaining whether the receipts from sales made to or by them are taxable.

(2) Such contractors may include, among others, building, electrical, plumbing, heating, painting, decorating, ventilating, paper hanging, sheet metal, bridge, road, landscape or roofing contractors and they may use one of the following methods in arriving at the total contract price:

(a) Contracts in which the contractor or subcontractor agrees to furnish materials and supplies and necessary services for a lump sum;

(b) Contracts in which the contractor or subcontractor agrees to furnish the materials and supplies and necessary services on a cost plus or fixed fee basis;

(c) Contracts in which the contractor or subcontractor agrees to furnish materials and supplies and necessary services with an upset or guaranteed price which may not be exceeded; and

(d) Contracts in which the contractor or subcontractor repairs, alters, improves or constructs real property and wherein he

agrees to sell specifically described and itemized materials and supplies at an agreed price or at the regular retail price and to complete the work either for an additional agreed price or on the basis of time consumed.

(e) When a contractor or subcontractor uses materials and supplies in fulfilling either a lump sum, cost plus, fixed fee, guaranteed price or any kind of contract except one falling in class (d) above, he becomes the ultimate consumer thereof. The person or dealer who sells such materials and supplies to such contractor or subcontractor is making sales at retail and is required to collect the tax from him based upon the receipts from such sales.

(f) In cases falling in class (d) above, the contractor or subcontractor is deemed to be selling tangible personal property at an agreed retail price and shall collect tax from his purchaser based upon the amount of the receipts from such sales, excluding installation charges if separately stated. A dealer selling to such contractor or subcontractor must obtain a resale certificate in lieu of tax.

(3) If a contractor's or subcontractor's business is only that of contracts in classes (2)(a),(b), or (c), he should not give a resale certificate and should pay tax on any of the materials and supplies purchased. If his business is also that of taking class (2)(d) contracts or of selling construction materials or other tangible personal property at retail, he shall furnish his dealers with a resale certificate on all purchases for resale. If a buyer gives a resale certificate and thereafter consumes some of the materials and supplies purchased in the performance of contracts in classes 2)(a),(b),or (c), he must include in his return to the Department of Revenue tax upon the cost price of the materials and supplies so used in addition to tax on retail sales under class (2)(d) contracts. If a contractor or subcontractor purchases materials and supplies without a resale certificate and subsequently sells some of them at retail or uses them in fulfilling

class (d) contracts, he must collect the tax thereon and report and pay same to the Department of Revenue. In such cases the contractor or subcontractor may take the tax paid by him to his dealers as a credit on his report to the Department. All contractors and subcontractors must maintain records in accordance with the requirements of s. 213.35, F.S., as created by section 6, Chapter 88-119, Laws of Florida, of all materials used in the performance of contracts for the improvement of realty, adequate to show that the appropriate tax has been accrued and remitted by them or paid to their vendors, as the case may be.

\* \* \*

(16) Materials purchased for use in the performance of lump sum, cost plus, fixed fee or guaranteed price contracts for the improvement of real property are taxable to all contractors, including but not limited to the following contractors. . .

Block and brick masons  
Burglar and fire alarm system  
Carpets (See subsection (40) of this rule)  
Cement workers  
Door  
Electrical  
Elevator and escalator  
Fencing  
Flooring

\* \* \*

(40) A contractor or subcontractor is construed to be improving real property and owes the tax on all materials and supplies that he uses in fulfilling the contract when he furnishes and installs wall-to-wall carpeting pursuant to a lump sum, cost plus, fixed fee, or guaranteed price contract when:  
(a) There is no retained title provision in the agreement; and  
(b) The carpeting is affixed to the floor by nails, glue or in some other manner and becomes the finished floor. (Emphasis supplied.)

37. Rule 12A-15.001(1) provides as follows:

(1) For the purpose of administering the Discretionary Sales Surtax (referred to as

the Surtax, or Tax), all rules relating to Sales and Use Tax (Chapter 12A-1, Florida Administrative Code) shall apply to the Surtax, except in those situations where rules relating to the Surtax have been issued to clarify specific statutory provisions.

38. Petitioner has failed to meet its burden to show that the Department's assessment was incorrect.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Department enter a final order upholding its assessments dated October 25, 1998, of sales and use tax, the local infrastructure surtax, plus applicable interest against Griffin Carpet Mart, Inc., with credit being provided for any payments made and for the assessments related to invoices numbered 68, 197, 262, 432, 481, 482, 497, and 498. It is further recommended after considering all the circumstances surrounding this case, that all penalties be waived.

DONE AND ENTERED this 7th day of April, 2000, in Tallahassee, Leon County, Florida.

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WILLIAM R. CAVE  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 7th day of April, 2000.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit 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.