

outstanding tax assessment against Petitioner, based on Petitioner's inability to pay, pursuant to Section 213.21, Florida Statutes.

PRELIMINARY STATEMENT

For the period August 1, 1992, through July 31, 1997, the Department of Revenue (Respondent), through a private accounting firm, pursuant to contract, conducted a sales and use tax audit of Copo Paint and Body Shop, Inc. (Petitioner). As a result of the audit, Respondent assessed sales and use tax, penalty, and interest against Petitioner in the amount of \$325,218.68.

Petitioner protested the assessment and by Notice of Decision dated September 17, 1999, Respondent notified Petitioner that the assessment would not be changed. Petitioner requested a reconsideration as to whether Respondent should compromise the tax, interest, and penalty, based on grounds of doubt of collectibility. By Notice of Reconsideration dated January 7, 2000, Respondent notified Petitioner that Petitioner failed to establish an inability to pay the assessment in full, and Petitioner timely challenged Respondent's determination. On March 20, 2000, this matter was referred to the Division of Administrative Hearings.

The sole issue presented for hearing by the Petitioner is whether Petitioner has the ability to pay the assessed sales and

use tax, penalty, and interest. At hearing, Petitioner presented the testimony of one of its owners, who is also Petitioner's president, and entered 17 exhibits (Petitioner's Exhibits numbered 1-9 and 11-17) into evidence. Petitioner's Exhibit numbered 10 was withdrawn. Respondent presented the testimony of two witnesses and entered 32 exhibits (Respondent's Exhibits numbered 1-32) into evidence, with two of the exhibits being deposition testimony.

A transcript of the hearing was ordered. At the request of the parties, the time for filing post-hearing submissions was set for more than ten days following the filing of the transcript. The Transcript, consisting of one volume, was filed on March 12, 2001. The parties timely filed their post-hearing submissions, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is a Florida corporation, engaged in the business of painting and repairing damaged automobiles and other vehicles. Petitioner's principal place of business and home office is located at 100 Northwest 9th Terrace, Hallandale, Florida.

2. Respondent is the agency charged with administering the tax laws of the State of Florida, pursuant to, among other provisions, Section 213.05, Florida Statutes.

3. Respondent is authorized to conduct audits of taxpayers. It is further authorized to request information to ascertain the tax liability of taxpayers, if any, pursuant to Section 213.34, Florida Statutes.

4. It is undisputed that Petitioner is a taxpayer.

5. From September 2, 1997 through March 12, 1999, Respondent conducted an audit of Petitioner to determine whether Petitioner had been properly collecting and remitting sales and use tax and whether any additional sales and use tax amounts were due.

6. On September 2, 1997, Respondent forwarded its form DR-840, Notice of Intent to Audit Books and Records, to Petitioner. The period of time being audited was from August 1, 1992 through July 31, 1997.

7. For part of the audit period, Petitioner's records were inadequate. Petitioner's record keeping was poor. For the remainder of the audit period, Petitioner's records were voluminous.

8. A higher amount of gross sales were reported on Petitioner's federal tax return than on Florida's tax return.

9. Petitioner could not document 95 percent of its exempt sales reported to the State of Florida. Petitioner reported a ratio of 35 percent for exempt sales on its filed Florida sales and use tax returns.

10. Because of the two factors of inadequate and voluminous records, sampling was required by Respondent. On January 12, 1998, Petitioner and Respondent entered into a written audit sampling agreement.

11. On June 5, 1998, Respondent provided its Notice of Intent to Make Audit Changes to Petitioner.

12. On July 21, 1998, Respondent issued its Notice of Intent to Make Audit Changes (revised), which was the first revision, to Petitioner.

13. On January 12, 1999, Respondent issued its Notice of Intent to Make Audit Changes (revised), which was the second revision, to Petitioner.

14. On March 12, 1999, Respondent issued its Notice of Proposed Assessment to Petitioner. This notice indicated that Petitioner owed additional sales and use tax in the amount of \$166,306.93, penalty in the amount of \$81,443.38, and interest through March 12, 1999, in the amount of \$77,468.37. Consequently, the notice further indicated that the total amount of the assessment against Petitioner was \$325,218.68.

15. A compromise of the assessed tax, interest, or penalty can be performed at Respondent's field level after an audit is completed and the case is still in Respondent's field office. However, the field office's authority is limited in that affected taxpayer must agree to the amount of the tax assessed. In the present case, Petitioner did not agree to the amount of the tax assessed and, therefore, Respondent's field office could not compromise the assessed tax, interest, or penalty against Petitioner.

16. On September 17, 1999, Respondent issued its Notice of Decision. Respondent notified Petitioner that the assessment would not be changed.

17. Petitioner requested a reconsideration as to whether Respondent should compromise the tax, interest, and penalty, based on grounds of doubt of collectibility. By Notice of Reconsideration issued January 7, 2000, Respondent notified Petitioner of Petitioner's failure to establish an inability to pay the assessment in full.

18. Petitioner timely challenged Respondent's determination of Petitioner's inability to pay the assessment and requested a hearing.

19. It is undisputed that Respondent has the discretion to compromise an assessment. Respondent may compromise tax or

interest based on doubt of collectibility of the tax or interest. The taxpayer bears the burden of providing documentation to support the taxpayer's position that it cannot pay the tax or interest.

20. Respondent examines whether a compromise is in the best interests of the State of Florida in determining whether to compromise an assessment. Respondent considers a compromise to be in the best interests of the State and may compromise the assessment under the following circumstances: (1) on the basis of the taxpayer providing documentation of the taxpayer's inability to pay the assessment in full but having the cash flow to make payments in installments; or (2) when a taxpayer's business or the taxpayer-corporation is insolvent and the taxpayer's or corporation's assets were used to satisfy legitimate liabilities and not used to enrich any person closely related to the taxpayer or corporation; or (3) when a taxpayer is gravely ill and the cash flow of the taxpayer's business is poor. When it considers compromising any tax, interest, or penalty, Respondent reviews several factors, including the audit file, financial information, and any other factors or circumstances which may affect collectibility.

21. The financial information considered includes positive and negative sales trends, cost of goods sold, profitability,

and net worth. Additionally, any changes in assets, in particular fixed assets, and liabilities are taken into account.

22. Other factors or circumstances considered include the fair market value of a taxpayer's assets, the future prospects of a taxpayer's business, and the solvency or insolvency of a taxpayer's business. Respondent does not consider the liquidation value of a taxpayer's business.

23. Petitioner was, and is, not familiar with the State of Florida's sales and use tax law, as the law relates to Petitioner's business.

24. Petitioner's president has no prior experience in maintaining the books and records of a company or in completing financial statements of a company. Petitioner's president never attended a seminar, presented or sponsored by Respondent, on Florida's sales and use tax, or read any of Respondent's pamphlets on sales and use tax.

25. Petitioner has a New York accountant, who never provided Petitioner's president or treasurer with any instructions regarding Florida's sales and use tax.

26. During the audit period, Petitioner never requested written advice from Respondent regarding the application of Florida's sales and use tax to its business.

27. For the last three years, Petitioner's sales have been a little less than \$1,000,000.

28. For the years 1996 and 1997, Petitioner's federal tax returns showed cash balances at the beginning of each year even though the cash balance for 1997, \$51,431, was less than for 1996, \$93,497.

29. Petitioner's federal tax returns for 1996 through 1998 indicate a loss for each year during that time period. However, a comparison between Petitioner's sales income in its federal tax returns and its state tax returns shows that Petitioner's sales income was grossly underreported.

30. Respondent's analysis worksheet, referred to as Doubt as to Collectibility Analysis Worksheet, indicated a negative dollar figure as to cash available by Petitioner to pay Respondent.

31. Inconsistencies existed between the information reported in Petitioner's tax returns and information provided by Petitioner during the protest period. Petitioner's sales figure as of August 31, 1999, an eight-month sales period for 1999, stated in its Petition for Reconsideration, dated October 6, 1999, was substantially less than the sales figure reported on Petitioner's sales and use tax returns filed during the same time period. Additionally, Petitioner overstated the cost of

goods sold in one of its federal tax returns, which resulted in an overstated net loss. The fair market value of Petitioner's assets indicated in its Petition for Reconsideration, \$30,000, was more than 100 percent of the value reflected on Petitioner's county tangible personal property return, \$13,000.

32. Also, further areas of inconsistencies existed between the information provided by Petitioner and the information reported on Petitioner's tax returns. Petitioner indicated that its former treasurer received a deferred compensation payment of \$60,000, but neither Petitioner's tax returns nor financial statements reflected a payment for the expense. Petitioner showed a loss on its 1996 federal tax return, which, according to Petitioner, was a result of moving expenses and expenses in the construction business; however, no expense unique to moving or the construction business was reflected on Petitioner's tax return or financial statement.

33. Petitioner's financial data, including federal tax returns and state wage reports, showed trends and deficiencies. A trend of an increase in gross sales for Petitioner was shown for the years 1997 through 1999, in Petitioner's federal tax returns for the same years and in Petitioner's Petition for Reconsideration, regarding its gross sales as of August 31, 1999. Additionally, the same federal tax returns showed a trend

of an increase in net income for the same years in that deductions in relation to sales were less than the previous years.

34. For the years 1994 through 1997, as reported on Petitioner's federal tax returns, Petitioner's depreciable assets increased each year.

35. Respondent's analysis worksheet also showed a negative dollar figure as to Petitioner's adjusted net worth.

36. As of August 31, 1999, the first eight months of 1999, Petitioner's total assets were \$40,814 and its total loans, payable to banks, were \$90,000.

37. Taking into consideration the totality of the circumstances, Petitioner failed to provide Respondent with adequate and complete documentation and information in order for Respondent to make a determination of collectibility.

CONCLUSIONS OF LAW

38. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes.

39. Section 120.80, Florida Statutes (1999), provides in pertinent part:

(14) DEPARTMENT OF REVENUE.-

* * *

(b) Taxpayer contest proceedings.-

1. In any administrative proceeding brought pursuant to this chapter as authorized by s. 72.011(1), the taxpayer shall be designated the "petitioner" and the Department of Revenue shall be designated the "respondent,"

2. In any such administrative proceeding, the applicable department's burden of proof, except as otherwise specifically provided by general law, shall be limited to a showing that an assessment has been made against the taxpayer and the factual and legal grounds upon which the applicable department made the assessment.

40. Petitioner was required to keep suitable books and records and to maintain such books and records during the audit period. Section 213.35, Florida Statutes. Petitioner failed to keep and maintain adequate records and Petitioner's records were voluminous. Respondent was justified in using a sampling of Petitioner's records and using the best information available. Subsections 212.12(5)(b) and (6)(b) and (c), Florida Statutes (1999).

41. In the instant case, Petitioner does not challenge the assessment, but challenges Respondent's failure to compromise the assessment, including interest and penalty. As a result, Respondent's assessment is considered valid. Even if Petitioner

had challenged the assessment, Respondent demonstrated that the assessment was valid.

42. Respondent is required to impose a penalty when a taxpayer fails to pay sales or use tax when due. Subsection 212.12(2)(a), Florida Statutes (1999).

43. Section 213.21, Florida Statutes (1999), provides in pertinent part:

(3)(a) 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 collectibility 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 noncompliance is due to reasonable cause and not to willful negligence, willful neglect, or fraud. In addition, a taxpayer's liability for penalties under any of the chapters specified in s. 72.011(1) in excess of 25 percent of the tax shall be settled or compromised if the department determines that the noncompliance is due to reasonable cause and not to willful negligence, willful neglect, or fraud. The department shall maintain records of all compromises, and the records shall state the basis for the compromise. The records of compromise under this paragraph shall not be subject to disclosure pursuant to s. 119.07(1) and shall be considered confidential information governed by the provisions of s. 213.053.

* * *

(4) The department is authorized to enter into agreements for scheduling payments of taxes, interest, and penalties.

(5) The department shall establish by rule guidelines and procedures for implementation of this section.

44. Rule 12-13.002, Florida Administrative Code, provides in pertinent part:

The meanings ascribed to the words and terms listed below shall be applicable, unless a different meaning is clearly indicated by the context in which the word or term is used.

(1) "Compromise" means a reduction of the amount of tax, interest, or penalty imposed to an amount less than the amount of tax, interest, or penalty imposed under a revenue law of this state. "Compromise" does not include correction of an error through cancellation of an erroneous billing, revision or withdrawal of an erroneous proposed assessment, or billing, or other corrective actions taken by the Department.

(2) "Department" means the Florida Department of Revenue.

(3) "Reasonable cause" means a basis for compromise of penalty which has been shown by the taxpayer to exist based upon the facts and circumstances of the specific case and which reflects that the taxpayer exercised ordinary care and prudence in complying with a revenue law of this state.

(4) "Revenue law of this state" means a statute imposing a tax, penalty or interest, license, or fee collected by the Department.

(5) "Settle" means the resolution of a particular taxpayer's liability for tax, interest, or penalty by the Department under the provisions of this rule.

(6) "Taxpayer" means a person subject to a revenue law of this state.

(7) In relation to an act or omission which constitutes a violation of the revenue laws of this state, "willful" means with actual knowledge or belief that such act or omission constitutes such violation and with intent nevertheless to commit or cause such act or omission.

45. Rule 12-13.003, Florida Administrative Code, provides in pertinent part:

(2) No tax, interest, penalty, or service fee shall be compromised or settled unless the taxpayer first submits a written request to compromise or settle tax, interest, penalty, or service fees and establishes as follows:

(a) In regard to tax or interest, doubt as to the taxpayer's liability for tax or interest, or actual lack of collectibility of the tax or interest as demonstrated to the satisfaction of the Department by audited financial statements or other suitable evidence acceptable to the Department. Grounds for finding doubt as to liability and doubt as to collectibility, respectively, are set forth in further detail in Rules 12-13.005 and 12-13.006, F.A.C.

(b) In regard to penalty, that the noncompliance was due to reasonable cause and not to willful negligence, willful neglect, or fraud. The taxpayer shall be required to set forth in a written statement the facts and circumstances which support the taxpayer's basis for compromise and which demonstrate the existence of reasonable cause for compromise of the penalty or service fee and such other information as may be required by the Department.

* * *

(d) Grounds for finding reasonable cause are set forth in further detail in Rule 12-13.007, F.A.C.

46. Rule 12-13.006, Florida Administrative Code, entitled "Grounds for Finding Doubt as to Collectibility", provides in pertinent part:

Tax or interest may be compromised or settled on the grounds of "doubt as to collectibility" when it is determined that the financial status of the taxpayer is such that it is in the best interests 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. The discretion to make this determination is delegated to those persons enumerated in Rule 12-13.004, F.A.C.

47. Rule 12-13.007, Florida Administrative Code, provides in pertinent part:

(4) Reliance upon the erroneous advice of an advisor is a basis for reasonable cause when the taxpayer relied in good faith upon written advice of an advisor who was competent in Florida tax matters and the advisor acted with full knowledge of all of the essential facts. Informal advice, advice based upon insufficient facts, advice received in cases where facts were deliberately concealed, or obviously erroneous advice are not grounds for reasonable cause. To establish reasonable cause based upon reliance on the advice of a competent advisor, the taxpayers shall demonstrate:

(a) That the taxpayer sought timely advice of a person who was competent in Florida tax matters;

(b) That the taxpayer provided the advisor with all of the necessary information and withheld nothing; and

(c) That the taxpayer acted in good faith upon written advice actually received from the advisor.

(5) Reliance upon the express terms of written advice given by the Department is a basis for reasonable cause when the taxpayer shows that the advice was timely sought from a departmental employee and that all material facts were disclosed, and that the express terms of the advice were actually followed.

48. Section 212.12, Florida Statutes, provides in pertinent part:

(2)(a) When any person, firm, or corporation required hereunder to make any return or to pay any tax or fee imposed by this chapter fails to timely file such return or fails to pay the tax or fee due within the time required hereunder, in addition to all other penalties provided herein and by the laws of this state in respect to such taxes or fees, a specific penalty shall be added to the tax or fee in the amount of 10 percent of any unpaid tax or fee if the failure is for not more than 30 days, with an additional 10 percent of any unpaid tax or fee for each additional 30 days, or fraction thereof, during the time which the failure continues, not to exceed a total penalty of 50 percent, in the aggregate, of any unpaid tax or fee. In no event may the penalty be less than \$10 for failure to timely file a tax return required by s. 212.11(1)(b) or \$5 for failure to timely file a tax return authorized by s. 212.11(1)(c) or (d).

49. It is clear that Respondent has the discretion to compromise an assessment of tax, penalty, or interest. Petitioner bears the burden to demonstrate that Respondent abused its discretion in refusing to compromise the assessed tax, penalty, or interest.

50. Petitioner failed to demonstrate that Respondent abused its discretion in refusing to compromise the assessed tax, penalty, and interest. Petitioner failed to demonstrate doubt as to collectibility of the assessed tax and interest. As to penalty, Petitioner failed to demonstrate that its noncompliance was due to reasonable cause. The underreporting, inconsistencies, and discrepancies place considerable doubt on Petitioner's assertion that it is unable to pay the assessment. Furthermore, Petitioner failed to demonstrate that it relied upon the advice of a competent advisor or upon written advice from Respondent.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department of Revenue enter a final order sustaining the assessment of tax, penalty, and interest against Copo Paint and Body Shop, Inc., and sustaining the refusal to compromise the tax, penalty, or interest.

DONE AND ENTERED this 4th day of June, 2001, in
Tallahassee, Leon County, Florida.

ERROL H. POWELL
Administrative Law Judge
Division of Administrative Hearings
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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.