4.26.05

STATE OF FLORIDA DEPARTMENT OF REVENUE
TALLAHASSEE, FLORIDA

EIGHT HUNDRED, INC.,	)	
	)	**DOR 05-12-FOF**
Petitioner,	)	
	)	
vs.	)	CASE NO. 02-0320 DmK Closed
	)	(DOAH)
FLORIDA DEPARTMENT OF REVENUE	)	
	)	
Respondent	)	AP
	)	

FINAL ORDER

This cause came before me, as Executive Director of the Florida Department of Revenue (the Department) for the purpose of issuing a Final Order. The Administrative Law Judge (ALJ) assigned by the Division of Administrative Hearings issued a Recommended Order (RO or Recommended Order), sustaining the Department's assessment. A copy of the RO issued on the 26th day of April, 2005, by Judge Daniel M. Kilbride is attached to this Final Order and incorporated to the extent described herein. On May 16, 2005, Petitioner filed his Exceptions to the RO. In response, on May 17, 2005, the Department filed a motion to strike Petitioner's Exceptions as being untimely filed. On May 25, 2005, the Department's counsel also filed a Response to Petitioner's Exceptions to the RO. On the same date, Petitioner filed a Response to Respondent's Motion to Strike and Motion to Excuse Untimeliness of Exception.

On May 31, 2005, the Department entered a Notice of Intent to Strike Exceptions, unless Petitioner filed a response within fifteen days demonstrating good cause or excusable neglect explaining why his Exceptions to the RO were not filed with the agency clerk as required by Florida law and administrative rule. On June 13, 2005, the Petitioner filed his Response to the Notice of Intent to Strike Exceptions.

The Department adopts and incorporates in this Final Order the Findings of Fact and Conclusions of Law contained in paragraphs 1-16, and 18-55. Finding of Fact contained in paragraph 17 is modified as reflected below.

The Department has jurisdiction of this cause.

RULING ON PETITIONER'S REPONSE TO THE DEPARTMENT'S NOTICE OF INTENT TO STRIKE PETITIONER'S EXCEPTIONS

As noted above, the ALJ's RO was entered in this case on April 26, 2005. Pursuant to section 120.57(l)(i), Florida Statutes, and Rule 28-106.217, Florida Administrative Code, exceptions to findings of fact or conclusions of law contained in a RO must be filed with the reviewing agency within fifteen days of the entry of the RO, which would have required the exceptions to be filed by 5 p.m. on May 11, 2005. Nevertheless, the Petitioner faxed his exceptions to the Department at 3:54 p.m. on May 16, 2005, five days beyond the deadline. An original signed copy of the exceptions was delivered by overnight courier to the Department on May 17th.

The Petitioner's assertion in his filing that, "[t]hese exceptions are timely in that they are being filed within fifteen days of the proposed order, plus five days for mailing", is irrelevant for two reasons. First, the exception was faxed, not mailed, so the five day mailing rule would not apply. Second, even if Petitioner had mailed the exceptions, Florida Administrative Code Rule 28-106.217(3), specifically states that no additional

time shall be added to the time limits for filing exceptions or responses to exceptions when service has been made by mail.

Florida Administrative Code Rule 28-106.103, addresses situations when service is made by fax. It provides that when service is made by facsimile telephone transmission, no additional time for the computation of time will be added. The filing date for an electronically transmitted document is the day the agency clerk gets the complete document. (Rule 28-106.104(9), FAC). Therefore, the document would have had to have been faxed May 11, 2005 to be timely.

Although Florida Administrative Code Rule 28-106.103, grants an additional business day when delivery is by overnight courier, even assuming Petitioner had not faxed a copy of the Exceptions to the Department, Petitioner's original overnighted copy was still received five days late.

Petitioner has thus waived his right to submit Exceptions to the RO in this proceeding, unless a basis exists for excusing the late filing on grounds of inadvertence, mistake, excusable neglect or other sufficient legal cause. See, e.g. Hamilton County Board of County Commissioner v. State of Florida Department of Environmental Protection, 587 So. 2d 1378, 1390 (Fla. 1st DCA 1991). Therefore, in response to the Respondent's Motion to Strike Petitioner's Exceptions as untimely filed, the Department issued a Notice of Intent to Strike Exceptions on May 31, 2005. In this Notice of Intent to Strike Exceptions, Petitioner was directed to show cause why the Exceptions should not be stricken due to the belated filing with the agency clerk.

In an affidavit attached to Petitioner's Response to Notice of Intent to Strike Exceptions, Petitioner testified he was out of town at hearings on April 28 and 29, 2005.

The following day, Petitioner departed for Canada and remained there until May 10, 2005. On May 11, 2005, Petitioner attended a trial. The Petitioner testified that his office could not provide the exact date when the RO was received. However, given that the RO was mailed, it is not unreasonable to assume it took two or three days to reach Petitioner. This would have had the RO being received on April 28 or 29, 2005, dates during which Petitioner was out of office. Given the affidavit and facts stated therein, Petitioner has met his burden in establishing excusable neglect, thus allowing his exceptions to be considered in this final order.

STATEMENT OF THE ISSUE

The Department adopts and incorporates in this Final Order the Statement of the Issue in the RO.

PRELIMINARY STATEMENT

The Department adopts and incorporates in this Final Order the Preliminary Statement in the Recommended Order as if fully set forth herein.

FINDINGS OF FACT

The Department adopts and incorporates in this Final Order the Findings of Fact in the Recommended Order as if fully set forth herein.

RULING ON PETITIONER'S EXCEPTIONS

Section 120.57(1)(k), Fla. Stat. provides, "An agency need not rule on an exception that does not clearly identify the disputed portion of the RO by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record."

Although Petitioner filed a document titled "Exception to Recommended Order", the Department does not rule on the exceptions in paragraphs 1-3, 5, 6-10, 12-34, 37-43, 45, 46, and 48 because they fail to identify clearly the disputed portions of the RO by page number or paragraph and do not include appropriate and specific citations to the record. Likewise, pursuant to section 120.57(1)(k), Fla. Stat., the Department does not rule on the Petitioner's exceptions in paragraphs 35, 44, 47, and 49 because they do not identify the legal basis for the exceptions, and do not include appropriate and specific citations to the record.

Ruling on Petitioner's Exception Paragraph 4

Petitioner attempts to have the agency reweigh evidence presented and ruled on by the ALJ. However, an agency reviewing a DOAH Recommended Order may not reweigh the evidence, resolve conflicts therein, or judge the credibility of witnesses, as those are evidentiary matters within the province of the administrative law judge as the trier of the facts. Martuccio v. Dept. of Professional Regulation, 622 So. 2nd 607, 609 (Fla. 1st DCA 1993); Heifetz v. Dept. of Business Regulation, 475 So. 2nd 1277, 1281 (Fla. 1st DCA 1985). Therefore, Petitioner's Exception in paragraph 4 is rejected.

Ruling on Petitioner's Exception Paragraph 11

While the Petitioner in paragraph 11 cites the specific paragraph of the RO he is excepting, Petitioner again impermissibly attempts to have the agency reweigh evidence presented and ruled on by the ALJ. For the same reasons cited in Petitioner's Exception Paragraph 4 above, the Petitioner's Exception Paragraph 11 is rejected.

Ruling on Petitioner's Exception Paragraph 36

In this paragraph, Petitioner asserts that relevant information (ie. the destruction of records) was simply not addressed in the Final Order. However this statement is incorrect. The ALJ in ruling on the Petitioner's motion to strike the audit in its entirety, addressed in depth the Respondent's record retention policy of keeping DR-15s for five fiscal years from date received (page 7 of the Preliminary Statement). Despite the fact that certain DR-15s were destroyed due to age, the ALJ specifically ruled that the downloads from the DR-15s contained the actual information provided by the Petitioner, and were not merely summaries of data. For that reason, the information used by the Respondent to reconstruct revenue records and to assess taxes, were acceptable (paragraph 42 of the RO). There is competent substantial evidence on the record to support the finding of fact. Petitioner's exception is rejected

Ruling on Recommended Order Finding of Fact Paragraph 17

Paragraph 17 of the RO states that David L. Schultz was the authorized representative of Respondent. However, the record clearly reflects David Schultz was the authorized representative of the Petitioner (Exhibit 8 - David Schultz deposition dated March 17, 2003, p.13-15; Composite Exhibit 1- David Schultz Power of Attorney dated 1/9/96). Therefore, "Respondent" is changed to "Petitioner" in the first sentence in paragraph 17.

CONCLUSIONS OF LAW

The Department adopts and incorporates in this Final Order the Conclusions of Law contained in the Recommended Order as if fully set forth herein.

Based on the forgoing, it is,

ORDERED that the Recommended Order as modified, is adopted and attached below and that Department's assessments as set forth in the Notice of Reconsideration dated November 16, 2001 are upheld. These assessments total $84,578.85 for sales and use tax and penalty, plus $34,564.31 in interest through November 7, 2001. Interest continues to accrue at $15.79 per day through the postmark date of payment. The assessment also includes surtax and penalty in the amount of $7, 547.67, plus $3,152.16 in interest through November 7, 2001. Interest thereon continues to accrue at $1.44 per day through the postmark date of payment.

DONE AND ENTERED in Tallahassee, Leon County, Florida this 19th day of July, 2005.

STATE OF FLORIDA
DEPARTMENT OF REVENUE

Jim Zingale
Executive Director

CERTIFICATE OF FILING

I HEREBY CERTIFY that the foregoing FINAL ORDER has been filed in the official records of the Department of Revenue this 19th day of July, 2005.

Nancy Purvis
AGENCY CLERK

Any party to this Order has the right to seek judicial review of the Order pursuant to Section 120.68, Florida Statutes, by filing a Notice of Appeal pursuant to Rule 9.110 Florida Rules of Appellate Procedure, with the Clerk of the Department of Revenue in the Office of the General Counsel, Post Office Box 6668, Tallahassee, Florida 32314-6668, and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this Order is filed with the Clerk of the Department.

Copies furnished to:

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EIGHT HUNDRED, INC.,

Petitioner,

CASE NO. 02-0320

v.

DEPARTMENT OF REVENUE,

Respondent.
_____/

PETITIONER'S EXCEPTIONS TO RECOMMENDED ORDER, FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner, Eight Hundred, Inc., by and through its undersigned counsel, and pursuant to this court's order directing that Exceptions to the Recommended Order be filed, hereby submits the following exceptions to the Recommended Order, findings of fact and conclusions of law.

Findings of Fact

1. The Proposed Order contains findings of fact and conclusions as to facts that are presumptions, and unsupported in the record. The findings of fact do not support the conclusions of law.

2. These exceptions are timely in that they are being filed within fifteen days of the date of the proposed order, plus five days for mailing.

3. The proposed order finds that the business of Petitioner consisted of snack bar sales and not rental income. The finding that Petitioner operated snack bars, not rentals is based on the assumption of the auditor, and not on any evidence heard by the court. Rental income is taxed at a different rate and is subject to exceptions. All persons with knowledge of the conduct of charity

bingo in this matter because the Petitioner derived its income from the rental of real estate to charities and to snack bar operators. Petitioner did not operate snack bars.

4. On page 19, paragraph 43 of the Recommended Order the Court finds that "Petitioner's agents, however, described the business operations of vending machine and snack bar operations". The Court interprets this to mean that Petitioner was physically running or employing persons to run the snack bars. There is no evidence of this. In fact in paragraph 43, the president of Petitioner clearly denies operating snack bars. The record evidence supports this statement by Petitioner's president.

5. The Florida Department of Revenue did not respond or reply to Petitioner's request for review of its sales tax payments for the lease to charities, except through the subsequent indictment of the Petitioner in 1995 for failure to pay sales taxes.

6. On or about November 1995, Eight Hundred, Inc. f/k/a Pondella Hall for Hire, was put out of business by the State of Florida through the imposition of a court ordered injunction and criminal indictment, all assets and all business records of the corporation were seized on November 7, 1995.

7. In paragraph 9 of the Recommended Order the Court finds that all business and banking records of Petitioner were seized on November 7, 1995. Actually, the evidence before the court was that records from two locations of Petitioner were seized by the Respondent by search warrant, one year earlier in 1994. Petitioners inability to maintain its records, (para. 330) is excused due to the seizure by the Respondent of the records before the audit. The Recommended Order uses the date in !995 to allege that Petitioner had all relevant business records in its possession at all times prior to 11/7/95. This is incorrect.

8. As contained in the record evidence the State of Florida seized Petitioner's business records in 1994 and 1995, subject to search warrants in Kissimmee, Florida at LaMirada Hall and in Orange County, Florida at Orange Blossom Bingo. Likewise, in 1994, Petitioner requested an audit of its records as to rentals and taxes on rentals, which audit was refused, in lieu of the criminal investigation. The proposed order also ignores these events.

9. Attached to these exceptions is the opinion of the Florida Fifth District Court of Appeal Case No. 5D04-1405; Eight Hundred, Et Al. v. State of Florida, 30 Fla.L.Weekly D 500 (Fla. 5th DCA March 9, 2005). In that opinion the 5th DCA clearly finds that Petitioner's DR-15's were seized in Lee County and have not been returned. While DOR may not be in possession of the DR-15's, neither in Petitioner.

10. On July 18, 1994, the Department of Revenue issued a Notice of Intent to assess taxes to Eight Hundred, Inc., to which the Petitioner filed a written request for an informal conference

11. The failure of Respondent to respond to Petitioner's request for an informal conference in July 1995, paragraph 8, is a significant event and not to be glossed over as occurs in the Recommended Order. The Informal Conference is a right of the Petitioner and Respondent's failure to provide this significantly affected Petitioner's ability to present DR-15's in a timely manner. After July 1995 all of Petitioner's records were seized on November 7, 1995. It is mere conjecture for the Court to find that it is Petitioner's failure to provide all DR-15' s during the audit. These records were provided and then destroyed by Respondent.

12. The testimony of the auditor in this matter, Paul Crawford, who calculated the

assessment is that he relied on computer summaries of DR-15's [illegible] prior to November 7, 1995 as requested by the Respondent would necessarily include DOR's paper DR-15's. This did not occur. Whether Petitioner had copies of DR-15's is moot, as all records were seized as of November 7, 1995.

13. The Respondent either intentionally or by serendipity denied Petitioner the right of an informal conference and only prosecuted the assessment once Petitioner's records were seized and Petitioner was crippled.

Denial of Due Process

14. The sales tax auditor was not aware of these prior seizures, nor were these business records available to Petitioner to assist in the audit.

15. The taxpayer never received this Notice or the copy of the taxpayer bill of rights until after it was acquitted of all criminal charges, relating to the failure to collect and pay sales in 2000.

16. On March 15, 2000, Petitioner filed a letter of protest of the audit finding after receiving the Notice of Tax Assessment. This protest letter is the inception of this proceeding. Therefore there is a correct presumption that Petitioner failed to receive notice within the normal course of business after the November 7, 1995 seizures.

17. All documents used by the Florida Department of Revenue, in support of its audit figures, including records as to the criminal investigation and records of communication, were destroyed by the Florida Department of Revenue, at or before the time it provided Petitioner Notice of the Tax Assessment.

18. Paul Crawford, in his audit, assumed that all revenues derived from sales were sales of goods and other items in snack bar operations.

19. [redacted] showed in its tax returns, pre-audit questionnaire, provided to Mr. Crawford, and answers to questions that the bulk of income of [redacted] during the audit period was in fact rental income for rent of snack bars to third parties.

20. During voir dire of this witness for the Florida Department of Revenue, counsel for the State of Florida admitted to the court that he had copies of the subpoenaed documents in his possession, but he would not provide them or allow for their introduction.

21. Those documents show that in 1995, during the time of the assessment and when the Petitioners request for informal conference was pending, the Florida Department of Revenue and the Office of Statewide Prosecution entered into an agreement that the Department of Revenue would cease all future actions, including any response to the requests of Petitioner for hearing and review of tax payments until criminal prosecution was over (Vol. III, p. 354).

Conclusions of Law

22. The proposed recommended order excludes and disregards all violations of the law by the Respondent. These include notable laws that should govern the Respondents conduct.

23. Florida law, specifically Section 213.015, Fla. Stat. (1995) provides taxpayers express guaranteed rights with regard to their treatment by the Department of Revenue and places on the Department of Revenue obligations of compliance. This Section is described as the taxpayer bill of rights.

24. These rights are guaranteed to Florida taxpayers in the Florida Statutes and Departmental Rules in Section 213.015 (1995), including the petitioner. Among those rights is the right to be informed of pending actions, the right to seek prompt review through formal or informal

proceedings, the right to all available information and prompt and accurate responses to the request for assistance is

25. The Florida Department of Revenue knowingly violated the Petitioners bill of rights, by failing and refusing to respond to its requests for review of overpayments of sales tax for commercial leases.

26. Florida law, dealing with administration of sales tax returns, allows the Florida Department of Revenue to establish formal and informal conference procedures for resolution of disputes relating to the assessment, interest and penalty of taxes. This is provided in Section 213.21 Fla. Stat. In June, 1995, Petitioner requested such an informal conference. The Department of Revenue acknowledged this request and refused to provide Petitioner with such a conference.

27. Pursuant to the provisions of Section 213.21, Fla.Stat, unless and until the State of Florida allows for an informal conference, the statute of limitation applies to initial assessment and is tolled for assessment of penalties and interest. The Department of Revenue knowingly and intentionally violated Florida law governing informal conferences.

Tax on Concession Stands in Halls

28. Section 212.031, Fla.Stat., provides various exemptions for the collection of sales tax. Among those are set out in subsection 10 that provide a sales tax privilege for

> Leased, subleased, licensed, or rented to a person providing food and drink concessionaire services within the premises of a convention hall, exhibition hall, auditorium, stadium, theater, arena, civic center, performing arts center, publicly owned recreational facility, or any business operated under a permit issued pursuant to chapter 550. A person providing retail concessionaire services involving the sale of food and drink or other tangible personal property within the premises of an airport shall be subject to tax on the rental of real property used for that purpose, but shall not be subject to the tax on any license to use the property. For purposes of this

subparagraph, the term "sale" shall not include the leasing of tangible personal property.

29. In addition, subsection 10 provides a pertinent part that an additional exemption exists for tax on concession services where the property is

> Rented, leased, subleased, or licensed to a concessionaire by a convention hall, exhibition hall, auditorium, stadium, theater, arena, civic center, performing arts center, or publicly owned recreational facility, during an event at the facility, to be used by the concessionaire to sell souvenirs, novelties, or other event-related products. This subparagraph applies only to that portion of the rental, lease, or license payment which is based on a percentage of sales and not based on a fixed price.

30. Section 212.031, Fla.Stat., amended and clarifies the previous provisions of Section 212.031, Fla.Stat. which was in effect during the years 1990 through 1995. The same subparagraph Section 212.031(10), Fla.Stat., (1995) of the exemption provides the following,

> Leased, subleased, or rented to a person providing food and drink concessionaire services within the premises of a movie theater, a business operated under a permit issued pursuant to chapter 550, or any publicly owned arena, sports stadium, convention hall, exhibition hall, auditorium, or recreational facility. A person providing retail concessionaire services involving the sale of food and drink or other tangible personal property within the premises of an airport shall be subject to tax on the rental of real property used for the purpose, but shall not be subject to the tax on any license to use the property. For purposes of this subparagraph, the term "sale" shall not include the leasing of tangible personal property.

31. Eight Hundred, Inc. paid tax on the rentals to a food and drink concessionaire of property used during the bingo games. Such taxes were wrongly collected and wrongly charged.

32. During these years, Eight Hundred, Inc. paid taxes on rent paid by charities for use of the hall. During the audit, it was revealed to the Department of Revenue that Eight Hundred, Inc., f/k/a Pondella Hall for Hire, Inc., had rented its hall to charities and other corporations that are 501c qualified. Rent from these corporations is not subject to tax. Nonetheless, such tax was collected.

33. Of the thirteen halls, Eight Hundred Inc. owned two of the halls. It had leased the remaining halls from owners. Eight Hundred Inc. paid tax on the rents paid to landlords for the rental of the entire property. For the second reason, the rents collected on the halls by the landlord precludes further taxation on the subleases by Petitioner, because Florida law expressly provides that the Department of Revenue is prohibited from pyramiding taxes. That is, it can tax, on one piece of property, only one rental tax for a certain period. This is set out in Section 212.031(13)(2)(a)(b), Fla.Stat., (2001) which provides,

> (2)(a) The tenant or person actually occupying, using, or entitled to the use of any property from which the rental or license fee is subject to taxation under this section shall pay the tax to his or her immediate landlord or other person granting the right to such tenant or person to occupy or use such real property.
>
> (b) It is further the intent of this Legislature that only one tax be collected on the rental or license fee payable for the occupancy or use of any such property, that the tax so collected shall not be pyramided by a progression of transactions, and that the amount of the tax due the state shall not be decreased by any such progression of transactions.

34. The proposed order also disregards the testimony of both experts for the Respondent and Petitioner as to the exception to the taxes on rental income.

Pyramiding of Taxes

35. Experts for both parties, Mr. Crawford and Mr. Rabazinski, agreed that if the revenue for which taxes are being assessed are rents, and these rents are on subleases, sales tax cannot be assessed on these revenues, since that would be pyramiding. Because Eight Hundred, Inc. paid taxes on the rental of the property to a landlord, it cannot be taxed again for its sublet of the same premises to third parties. Such matters were brought up during the course of the audit and under Florida law, Section 212.031, Fla.Stat.

Destruction of Tax Records, Delay and Denial of Due Process

36. The proposed order disregarded and avoided all issues of the destruction of records that occurred by Respondent.

37. Florida law permits a taxpayer to claim a refund under two provisions. Under Section 212.095, Fla.Stat. a taxpayer may file for a refund by filing a Department of Revenue Form 25 with the Florida Department of Revenue. Alternatively, under Section 212.12(6)(c)3.a., Fla.Stat., (2002) a taxpayer is entitled to a refund during the course of an audit. That section provides,

> A taxpayer is entitled, both in connection with an audit and in connection with an application for refund filed independently of any audit, to establish the amount of any refund or deficiency through statistical sampling when the taxpayer's records, other than those regarding fixed assets, are adequate but voluminous. Alternatively, a taxpayer is entitled to establish any refund or deficiency through any other sampling method agreed upon by the taxpayer and the department when the taxpayer's records, other than those regarding fixed assets, are adequate but voluminous.

38. This audit was initiated in this case as part of a criminal investigation, which resulted in the acquittal of Petitioner of all charges. Because of the seizure and destruction of many of Petitioner's tax records, at this time, Petitioner is unable to liquidate the amount of the refund.

39. One cannot avoid the elephant that has been sitting in the hearing room during these proceedings. In addition to the intentional destruction of records and the refusal of counsel to produce them, the State of Florida has made a continuing effort, over the course of nine years to frustrate, interfere and hamper all efforts by Petitioner to address its problems and have a full and fair hearing of these legal issues.

40. As recently as a few weeks ago, the Fifth District Court of Appeals, in the case, Eight Hundred, Inc.et.al v. State of Florida, 30 Fla.L. Weekly D500 (Feb. 18, 2005, 5th DCA) ruled that

the State of Florida seized a computer server and ordered the return business records of Petitioner, including sales tax records. This is one in a long line of cases, where Petitioner has prevailed in appeals to get its property and business records back. See also Pondella Hall for Hire, Inc. v. Lamar, 866 So.2d 719 (Fla. 5th DCA), review denied, 879 So.2d 823 (Fla. 2004) Pondella Hall for Hire, Inc. v. Croft, 844 So.2nd 696 (Fla. 5th DCA 2003), Pondella Hall for Hire, Inc. v. City of St. Cloud, 837 So.2nd 510 (Fla. 5th DCA 20003); Eight Hundred, Inc. v. State of Florida, 781 So.2nd 1187(Fla 5th DCA 2001). In each case, the State of Florida has refused.

41. These cases are merely progeny of the Florida Supreme Court decision in the Florida Department of Legal Affairs v. Bradenton Group, Inc. 727 So.2d 199 (Fla. 1998), wherein the court ruled that the initial seizure of all business records in 1995 by the Office of Statewide Prosecution and the Florida Department of Revenue was illegal ab initio. We are still facing issues of destroyed, concealed and lost business records of the Petitioner, who is trying to conduct litigation.

42. As the audit, the destruction of the DR-15's is without any reasonable excuse. Florida law is clear that Respondent DOR must authenticate the original DR-15's from which the summary DR-15's are compiled, "proof of which shall be filed with the court". §90.956, Fla.Stat. Respondent DOR has not offered proof or notice of authentication. Johnson v. State, 856 So.2d 1085 (Fla. 5th DCA 2003); Bowmar v. Fidelity, 466 So.2d 344 (Fla. 3rd DCA 1995).

43. Florida law is also clear that Respondent DOR must produce copies of the original DR-15's to 800, Inc., upon request. §90.956, F.S. On April 25, 2002, Eight Hundred, Inc. filed a second request to produce the original DR-15's. At the hearing a subpoena was issued, a witness appeared to simply testify that at some time all records were destroyed, but she could not say whether

it was a month prior or ten years prior. This is a puzzle that only serves the Florida Department of Revenue.

44. Respondent DOR did not abide by the mandatory notice requirement of Florida law concerning summaries. Barlemento v. Dove Fountain, Inc., 593 So.2d 234, 240 (Fla. 5th DCA 1991). From the testimony, it is clear that the summaries that Respondent DOR relies upon are not identical documents to the original DR-15's. There are issues as to telephone income, the purchase versus the manufacture of the poker machines, and typographical errors. There exists simply no means to verify the DR-15 summaries offered by Respondent DOR, how the income was itemized and the like.

45. The testimony of Paul Crawford, auditor for DOR, makes clear that the original Dr-15's are necessary. It is a denial of due process for Petitioner 800, Inc. to have evidence introduced against it, in contravention of §90.956, F.S. Public Health Trust v. Valcin, 507 So.2d 596 (Fla. 1987), and have destroyed those records during the course of the litigation.

46. DOR's actions, even in the absence of bad faith, are in contravention of the Florida Taxpayers Bill of Rights. No destruction of audit materials, and no refusal to return Petitioner's business records is acceptable. In 1998, the Florida Supreme Court ruled the seizure of those records illegal, and seven years later, the Fifth District Court of Appeals is still ordering the return of records.

47. If it is policy for Respondent DOR to destroy original documents after a set period of time, DOR should not be allowed to introduce summaries in this matter. This is because according to the letters that were not admitted into evidence, and also destroyed by Respondent, the Statewide Prosecutor's Office specifically requested that DOR refrain from prosecution of 800, Inc. for alleged civil tax infractions. As such, DOR had the duty to maintain any and all original documents pending decision to prosecute 800, Inc. at a future date. DOR did not do this.

48. Florida law provides for sanctions when evidence is destroyed, even in the absence of bad faith in the destruction of such evidence. Rockwell v. Morales, 561 So.2d 677 (Fla. 3rd DCA 1990). This is because Petitioner's experts have not reviewed the originals and no one has or can verify the accuracy of the summaries against the originals. Aldrich v. Roche Biomedical, 737 So.2d 1124 (Fla. 5th DCA 1999).

49. The striking of the audit at issue is appropriate as there exists no original DR-15's to verify the accuracy and integrity of this audit. Serious questions concerning accuracy and integrity of the audit are evident from depositions in this matter.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a true and correct copy of the foregoing has been mailed by regular U.S. Mail delivery and by facsimile transmission this 16th day of May, 2005 to: John Mika, Esq., Assistant Attorney General at (850) 488-5865, Department of Legal Affairs, PL01, The Capital, Tallahassee, FL 32399-1050 and by overnight delivery and facsimile transmission to Bruce Hoffman, General Counsel, Department of Revenue at (850) 488-7112 , 204 Carlton Building, Tallahassee, Florida 32399-0100.

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT
JANUARY TERM

EIGHT HUNDRED, INC., ET AL.,

Appellant,

v. Case No. 5D04-1405

STATE OF FLORIDA,

Appellee.

_____/

Opinion filed February 18, 2005

Appeal from the Circuit Court for
Orange County,
C. Alan Lawson, Judge.

Thomas F. Egan of Thomas F. Egan, P.A.,
Orlando, for Appellant.

No Appearance for Appellee.

MONACO, J.

This case in a number of different iterations has been a frequent visitor to this court.[1] Pondella Hall for Hire, Inc., n/k/a Eight Hundred, Inc. ("Eight Hundred"), and the other appellants in this appeal have been acquitted of all criminal charges against them,

[1] Various interrelated cases have been reviewed by this court over the years. *See Pondella Hall for Hire, Inc. v. Lamar*, 866 So. 2d 719 (Fla. 5th DCA), *review denied*, 879 So. 2d 623 (Fla. 2004); *Pondella Hall for Hire, Inc. v. Lamar*, 860 So. 2d 19 (Fla. 5th DCA 2003); *Pondella Hall for Hire, Inc. v. Croft*, 844 So. 2d 696 (Fla. 5th DCA 2003); *Pondella Hall for Hire, Inc. v. City of St. Cloud*, 837 So. 2d 510 (Fla. 5th DCA 2003); *Eight Hundred, Inc. v. State*, 781 So. 2d 1187 (Fla. 5th DCA 2001). *See also, Dep't of Legal Affairs v. Bradenton Group, Inc.*, 727 So. 2d 199 (Fla. 1998).

and seek the return of personal property seized by the State in connection with those charges. We are now faced with the issue of whether the motion for return of personal property filed by Eight Hundred sufficiently identified the seized property.

Eight Hundred's predecessor was a business that operated bingo halls in several counties. As a result of a multi-county criminal investigation, state and local authorities seized Eight Hundred's personal property, and sought to enjoin it from operating bingo games at various locations. Numerous criminal charges, as well as forfeiture and RICO actions, were brought against Eight Hundred's predecessor, none of which appear to be currently pending. After giving Eight Hundred many opportunities to describe the items of property with greater specificity, the trial court denied the motion seeking return of the property with prejudice as "legally insufficient," finding that the property had never been adequately identified by the movant. Eight Hundred appeals the order of dismissal.[2] For the most part we agree with the trial judge and commend him for his patience. Nevertheless, Eight Hundred does appear to have identified a few items with sufficient definition, and as to those items, we reverse.

A court has inherent power to direct the return of property seized from a criminal defendant if that property is no longer needed as evidence. *See Coon v. State*, 585 So. 2d 1079 (Fla. 1991). To be facially sufficient, a motion for the return of seized property must allege that the property at issue was the movant's personal property, was not the fruit of criminal activity, and was not being held as evidence. Implied in this standard is the requirement that the defendant must specifically identify the property at issue. *See Bolden v. State*, 875 So. 2d 780 (Fla. 2d DCA 2004). In *Coon*, the court noted that the

[2] We have jurisdiction. *See* Fla. R. App. P. 9.130(a)(1)(C)(ii).

Accelerant's description of the property allegedly taken was "somewhat vague" as it merely set forth "tools, radios, speakers, etc." The court indicated, however, that since the alleged dates of the seizures were listed and a return search warrant inventory was included, the information provided was sufficient to satisfy any uncertainty regarding a proper description of the property sought. To some extent, we have the same circumstance here.

From our review of the record it appears that the following items were identified with enough particularity to permit the trial court to determine whether they should be returned to Eight Hundred:

A. Property seized in Orange County:

1. Bingo lottery drum.
2. Invoices and correspondence actually in possession of the Attorney General's Office.

B. Property seized in Lee County: DR-15 (sales tax documents), to the extent that the same are in the possession of the State and have not been destroyed.

C. Property seized in Osceola County: Items listed in the search warrant inventory and receipt dated March 30, 1994.

Accordingly, we affirm the dismissal in all respects, except as to the items listed above. We remand the case to the trial court for a determination regarding whether these items ought to be returned to Eight Hundred.

AFFIRMED in part, REVERSED in part, and REMANDED.

PLEUS and TORPY, JJ., concur.

[redacted]

FACSIMILE COVER SHEET

DATE: May 16, 2005 TIME: _____

TO: John Mika, Esq.
Assistant Attorney General

FAX NO: 1-(850) 488-5865

RE: Eight Hundred, Inc. vs. Florida Department of Revenue
Case No.: 02-0320

Total Number of Pages (Including Cover Sheet): 16

Attached please find Respondent's Exceptions to Recommended Order.

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