STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EIGHT HUNDRED, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 02-0320
	)	
DEPARTMENT OF REVENUE,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, the above-styled matter was heard before Daniel M. Kilbride, Administrative Law Judge, of the Division of Administrative Hearings on October 23, 2004, in Orlando, Florida, and on November 23, 2004, in Tallahassee, Florida. The following appearances were entered:

APPEARANCES

For Petitioner: Thomas F. Egan, Esquire
Law Office of Thomas F. Egan, P.A.
204 Park Lake Street
Orlando, Florida 32803

For Respondent: John Mika, Esquire
Office of the Attorney General
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

STATEMENT OF THE ISSUES

Whether Petitioner, Eight Hundred, Inc. (Petitioner), collected and remitted the proper amount of sales tax on its

retail sales activities, and either paid or accrued use tax on its purchases.

PRELIMINARY STATEMENT

In 1994, an audit was conducted on Petitioner for the period August 1, 1989, through July 31, 1994. A Notice of Intent to Make Sales and Use Tax Audit Changes (NOI) was issued by Respondent in the summer of 1995. Petitioner protested the NOI on July 18, 1995, and requested an informal conference. No request for an informal conference was granted, and Respondent issued its Notice of Proposed Assessment (NOPA) on November 11, 1995.

Due to an ongoing criminal investigation by the Office of the Statewide Prosecutor, all further administrative action by Respondent was suspended. This administrative action resumed when on March 15, 2000, Petitioner filed a letter of protest of the audit findings. On June 11, 2001, Respondent rejected Petitioner's position in its Notice of Decision (NOD), and following Petitioner's Petition for Reconsideration, Respondent issued its Notice of Reconsideration (NOR) on November 16, 2001, denying the Petition. On January 15, 2002, Petitioner filed its Petition for Formal Administrative Hearing, and this matter was referred to the Division of Administrative Hearings (DOAH) on January 23, 2002. Discovery ensued and several continuances were granted at the request of the parties to facilitate

discovery. On June 19, 2002, Respondent filed a Motion for a Determination that the accountant-client privilege had been waived. Following the filing of the response by Petitioner, legal memoranda by the parties, and oral argument, an Order was entered granting the motion on July 25, 2002. Petitioner took an interlocutory appeal of the Order to the Court of Appeal, First District of Florida (First DCA). Proceedings in this matter were stayed until the court ruled on the appeal. On February 12, 2003, the court issued its opinion quashing the Order and directed that an evidentiary hearing be held. The evidentiary hearing on the renewed Motion for Determination was held on April 10, 2003, and the Order Granting Respondent's Motion for Determination was issued on July 23, 2003. This new Order was appealed to the First DCA. Proceedings were again stayed. On February 4, 2004, the Court entered its Opinion denying the Writ of Certiorari on the merits and issued its Mandate on February 4, 2004.

Thereafter, discovery recommenced and following other discovery and procedural motions and Orders, the formal hearing commenced on October 23, 2004, in Orlando, Florida, and was completed on November 23, 2004, in Tallahassee, Florida.

At the formal hearing, the following witnesses testified. For Petitioner: Richard Rabanzinski; Philip Furtney, president of Eight Hundred, Inc.; Pat Savage; and Rhonda Ward, records

custodian, Department of Revenue. For Respondent: Paul Crawford, certified public accountant (CPA), contract auditor, Department of Revenue; Linda Gammons-Thurman, Tax Specialist II, Department of Revenue; David L. Schultz, CPA; and Rhonda Ward.

The following exhibits were offered by Petitioner: 1) Petitioner's spread sheet with calculations of sales tax subgroup "Canteen" removed from total revenues (26 pages); 2) Lease of retail space between the Whitney Management Corporation and the Universal Christian Conference, Inc., dated January 12, 1990; 2a) Assignment of lease and amending Agreement between the Universal Christian Conference, Inc., Pondella Hall for Hire, Inc., d/b/a Towne Center Hall for Hire and the Whitney Management Corporation, d/b/a the Whitney Equity Corporation dated September 11, 1991; 3) Lease agreement between Avon Plaza Associates and Pondella Hall for Hire, Inc.; 4) Lease agreement between Joseph E. Marx Company c/o Marx Realty and Pondella Hall for Hire, Inc., dated August 12, 1993; 4a) Assumption and assignment of lease between Peter Marini, Antonio Monesano and Giuseppe Montesano, and Marx Realty and Improvement Co., Inc., dated April 25, 1989; 5) Amendment of lease between Lomangino Enterprises, Inc., through its agent, the Trans Coastal Group, Inc., and Pondella Hall for Hire, Inc., d/b/a Pondella Bingo dated February 12, 1991; 6) Lease agreement between Lennar Florida Retail II, Q.A., Ltd., and Pondella Hall for Hire, Inc.,

d/b/a Northtowne Bingo dated December 1, 1994; 7) (NOT ADMITTED) Sublease agreement dated February 15, 1992, between Pondella Hall for Hire, Inc., and Maii Tattersall; 8) (NOT ADMITTED) Letter from David L. Ward to Robert A. Cone, Revenue Investigator--Criminal Enforcement regarding Pondella Hall for Hire, Inc., dated August 14, 1995; 9) Information dated March 24, 1997; 10) (NOT ADMITTED) Letter from Jodie Breece, Office of Statewide Prosecution of Mr. Gene Sheffer, Criminal Investigation Maitland Region dated September 12, 1995; 11) (DEPOSITION EXHIBIT 8) Letter from David L. Schultz, CPA, Schultz Chapel and Co. to Terri Madsen, Contract Audit Division, State of Florida, Department of Revenue dated July 18, 1995.

The following exhibits were offered by Respondent: 1) Audit work papers contained in Composite Exhibit No. 1, marked with white colored tabs numbered 1 through 13; 2) NOI dated June 23, 1995, marked with one red tab; 3) Notice of Intent to make audit changes for sales and use surtax dated June 23, 1995, and marked with one red tab; 4) April 27, 2004, trial deposition of David L. Schultz with eight exhibits attached; 5) Pages 1 through 26 of the March 17, 2003, deposition of David L. Schultz and Exhibits 1 and 2; 6) July 19, 2004, trial deposition of Linda Gammons-Thurman with 24 exhibits attached.

The following was admitted as a Joint Exhibit: Correspondence contained in Composite Exhibit 1, marked with blue colored tabs.

Respondent offered the following rebuttal exhibit: Account profile screens, payment screens, and payment detail worksheets.

Petitioner filed a motion to exclude this evidence and for further relief to strike the audit in its entirety based on a perceived violation of Section 90.956, Florida Statutes (2004). After review of Bradenton Group, Inc. v. Department of Legal Affairs, 701 So. 2d 1170 (Fla. 5th DCA 1997); Department of Legal Affairs v. Bradenton Group, Inc., 727 So. 2d 199 (Fla. 1998); Eight Hundred, Inc. v. State of Florida, 781 So. 2d 1187 (Fla. 5th DCA 2001); Pondella Hall for Hire, Inc. v. City of St. Cloud, 837 So. 2d 510 (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. Lamar, 866 So. 2d 719 (Fla. 5th DCA 2004); rev. den., 879 So. 2d 623 (Fla. 2004); and Eight Hundred, Inc. v. State of Florida, 30 Fla. L. Weekly D500, 2005 WL 387674 (Fla. 5th DCA February 18, 2005), Petitioner's motion is denied for the following reasons: First, the Florida Department of Revenue was not a party in any of the above-cited cases and did not have possession of the documents sought to be returned; Second, the Form DR-15 (DR-15) downloads are not summaries of data, but contain the actual information provided

by Petitioner; and Third, the DR-15 is a document which is prepared by the taxpayer and submitted to Respondent. The document is designed so that the taxpayer can maintain a copy of the form sent to Respondent. The testimony of Respondent's auditor was that he examined those DR-15s which were contained within the records provided by Petitioner's representative during the audit in 1995. Therefore, Petitioner was in possession of at least some of its own DR-15s (those which were shown to the auditor). Whether Petitioner failed to make and retain a copy of all the DR-15s for the audit period, or misplaced or destroyed them, is an issue of fact on which Petitioner has not presented any evidence. The testimony of Rhonda Ward, Respondent's record custodian, is that Respondent's record retention policy for the DR-15 is five fiscal years from the date received; therefore, by policy, Respondent would have destroyed yearly its copies of any DR-15s received for each year of the audit period beginning August 1, 1989, through July 31, 1994, or July 31, 1999, through July 31, 2000, respectively. There has been no showing of bad faith or any other reason to support striking the audit.

The final volume of the Transcript was filed on February 4, 2005. Following a request for extension of time to file proposed recommended order, the parties filed their proposals on March 16, 2005. A Notice of Filing Supplemental Authority was

filed by Petitioner on April 22, 2005. Each of the parties' proposals has been given careful consideration in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is a Florida corporation.

2. Petitioner's revenues are derived, in part, through the operation of vending machine businesses throughout the State of Florida. Petitioner placed coin-operated cigarette, food and beverage, candy, and amusement vending machines in various bingo halls located throughout the state.

3. These locations included: Pondella Hall for Hire, Inc.; Avon Plaza Bingo; Bingo Trail; Causeway Plaza Bingo; Dunnellon Bingo; Fountains Plaza Bingo; Lamirada Plaza Bingo; Northtowne Bingo; Orlando Bingo; Pondella Bingo; Sanford Bingo; Sarasota Crossings Bingo; South Belcher Bingo; and Towne Centre Bingo.

4. Respondent is the state agency charged with the responsibility of enforcing the Florida Revenue Act of 1949 (Chapter 212, Florida Statutes (2003)), as amended. Among other things, Respondent performs audits on taxpayers to ensure that all taxes due have been correctly paid.

5. In 1994, an audit was conducted on Petitioner covering the audit period from August 1, 1989, through July 31, 1994.

6. After the results of the audit were obtained on June 23, 1995, Petitioner issued a NOI wherein it proposed to assess Petitioner $48,026.75 in unpaid sales tax, $18,520.05 in delinquent penalties, and $15,836.40 in accrued interest on the unpaid tax; and $4,383.13 in unpaid discretionary sales surtax, $1,875.80 in delinquent penalties, and $1,088.58 in accrued interest on the unpaid discretionary sales surtax through the date of the notice for a total of $89,730.71.

7. By letter dated July 18, 1995, Petitioner protested the NOI and stated that (a) Petitioner was not willful in any of the errors discovered during the audit; (b) Petitioner filed and paid the tax it believed to be accurate; and (c) Petitioner has taken steps to correct the problems identified in the audit and is now filing timely in accordance with the applicable rules pertaining to the transactions in which it was engaged.

8. Petitioner requested that the penalties and interest be abated and requested an informal conference if the letter inquiry could not be honored. For reasons unknown, the requested conference was not provided by Respondent.

9. On November 7, 1995, under a search warrant issued at the request of the Florida statewide prosecutor, all business and banking records of Petitioner, then known as Ponderosa-for-Hire, Inc., were seized.

10. Respondent issued its NOPA sustaining the assessment in full, which with accrued interest, then totaled $92,126.52.

11. On March 15, 2000, Petitioner filed a letter of protest of the audit findings.

12. On June 11, 2001, Respondent issued its NOD rejecting Petitioner's position.

13. On July 9, 2001, a Petition for Reconsideration was filed by Petitioner. Additional letters were sent to the Respondent subsequent to the July 9, 2001, petition.

14. Respondent issued its NOR on November 16, 2001, denying the petition.

15. On January 15, 2002, Petitioner filed its petition with Respondent seeking an administrative hearing with DOAH.

16. The private accounting firm of Crawford and Jones conducted a state sales and use tax audit of Petitioner under the authority of Respondent's contract audit program. The audit began on September 8, 1994, upon issuance of Respondent's Form DR-804 (DR-804). The DR-840 included a list of records which were to be produced, including federal tax returns, state sales and use tax returns, sales journals, invoices, and purchase invoices.

17. The authorized representatives of Respondent for the audit was David L. Schultz of the accounting firm Schultz, Chaipel and Company. Representation began upon presentation to

Respondent of Form DR-843, Power of Attorney and Declaration of Representation, dated January 9, 1995.

18. Included among the records provided to Respondent's auditor were ledgers, journals, taxpayer copies of DR-15 (sales and use tax return), bank statements, tax returns, financial statements.

19. A schedule of income earned by Petitioner, by location and category of income, was provided to Respondent by Mr. Schultz's office. This schedule of income had been created by Philip Furtney, president of Petitioner, from records he kept on his home computer. The categories of income listed on the schedules were, for each hall location: canteen, cigarette, soft drink machines, crane machines, and telephones. Beginning in fiscal year 1992, a new category titled "miscellaneous" was added; and in fiscal year 1993, the category "rent" was added.

20. Respondent's auditor compared the data contained in these schedules, for each tax year, with other reported items, such as tax returns and financial statements, to ascertain if the figures reported were a reasonable representation of income and that reliance could be placed on the data. After determining the schedules to be reasonable, Respondent's auditor used this data to calculate the amount of sales tax due based on the income reported.

21. The effective state sales tax rate, when sales are made through coin-operated amusement and vending machines and other devices, is found in Florida Administrative Code Rules 12A-1.044 and 12A-15.001. The effective state sales tax rate for sales involving fractions of a dollar is found in Florida Administrative Code Rules 12A-1.004 and 12A-15.002. Respondent's auditor's work papers break out the different effective tax rates for each of Petitioner's revenue activities, including the different surtax rates.

22. Credit for taxes remitted by Petitioner was calculated from the Form DR-15 downloads.

22. Adjustments were made to this data where the total amount reported was illogical, duplicative, or otherwise appeared incorrect. The total amount of sales tax due, as reported in the Schedule "A" sales, was determined by subtracting sales tax remitted to Respondent from the amount calculated on total retail sales made. This amount was $33,269.75 in sales tax and $3,912.95 in surtax.

23. "Use" tax liability was calculated on two activities: First, items of tangible personal property purchased by Petitioner during the audit period for which the invoices did not affirmatively show that sales tax was paid; and secondly, on the stuffed animals contained in the crane machines which are considered concession prizes.

24. The method for calculating the use tax on concession prizes is described in Florida Administrative Code Rule 12A-1.080. Because the operator of game concessions award tangible personal property as prizes to those who pay to play the machine, the operator is the ultimate consumer of the property (prize). The basis for determining tax liability is computed by multiplying six percent times 25 percent of the gross receipts from all such games, in this instance, the crane machines.

25. The total amount of use tax due, as reported in the Schedule "B" purchases, was $14,757 in tax and $470.18 surtax.

26. After the NOI was issued, the audit file was forwarded to Respondent's Tallahassee office.

27. The preponderance of the evidence supports the conclusion that the sales activity of Petitioner included revenue received from vending and amusement machines and snack bar operations.

28. Federal tax return for the fiscal year 1992 does not list any amount of income as being derived from rental activity. The federal returns for years 1991 and 1993 list rental income; however, no information was given to Respondent's auditor during the audit to explain what this income was and from where it was derived.

29. Applications for Registration were filed by Petitioner when each hall location began operations. Of the 23 registration applications filed, nine of them listed the major business activity as vending-food and amusement; eight of them listed the major business activity as restaurant, snack bar or canteen service; five listed the major business activity as rental; and one gave no activity.

CONCLUSIONS OF LAW

30. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Section 120.569 and Subsections 120.57(1) and 213.67(7), Florida Statutes (2004).

31. When a taxpayer disputes a proposed assessment of tax, Subsection 120.80(14), Florida Statutes (2001), applies, which reads in pertinent part:

> (14) DEPARTMENT OF REVENUE.--
>
> (a) Assessments.--An assessment of tax, penalty, or interest by the Department of Revenue is not a final order as defined by this chapter. Assessments by the Department of Revenue shall be deemed final as provided in the statutes and rules governing the assessment and collection of taxes.
>
> (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," except that for actions contesting an assessment or denial of refund under chapter 207, the Department of Highway Safety and Motor Vehicles shall be designated the "respondent," and for actions contesting an assessment or denial of refund under chapters 210, 550, 561, 562, 563, 564, and 565, the Department of Business and Professional Regulation 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.
>
> * * *
>
> 4. Except as provided in s. 220.719, further collection and enforcement of the contested amount of an assessment for nonpayment or underpayment of any tax, interest, or penalty shall be stayed beginning on the date a petition is filed. Upon entry of a final order, an agency may resume collection and enforcement action.
>
> 5. The prevailing party, in a proceeding under ss. 120.569 and 120.57 authorized by s. 72.011(1), may recover all legal costs incurred in such proceeding, including reasonable attorney's fees, if the losing party fails to raise a justiciable issue of law or fact in its petition or response.

32. Respondent is authorized to prescribe the records to be kept by all persons subject to taxes under Chapter 212, Florida Statutes (2001). Such persons have a duty to keep and preserve their records, and the records shall be open to

examination by Respondent or its authorized agents at all reasonable hours pursuant to Subsection 212.12(6), Florida Statutes (2001).

33. Subsection 212.13(5)(c), Florida Statutes (2001), provides that only records, receipts, invoices, resale certificates, and related documents, which are available to the auditor when the audit begins, shall be deemed acceptable for the purposes of conducting such audit.

34. Subsection 212.05(1)(a)1.a., Florida Statutes (2001), levies a tax at the rate of six percent of the sales price of each item or article of tangible personal property when sold at retail in this state.

35. Section 212.055, Florida Statutes (2001), authorizes the appropriate governing bodies to levy a discretionary sales surtax. During the audit period, the applicable surtax rate in the various counties in which Petitioner conducted business was either .5 or 1.0 percent.

36. Subsection 212.07(2), Florida Statutes (2001), provides that any dealer who neglects, fails, or refuses to collect the tax specified in Chapter 212, Florida Statutes (2001), on all retail sales shall be liable for and pay the tax.

37. Subsection 212.07(8), Florida Statutes (2001), provides that any person who has purchased, at retail, tangible personal property and cannot prove that the tax levied by this

chapter has been paid to his vendor is directly liable to the state for any such tax, interest, or penalty due on any such taxable transactions.

38. In addition, when penalties and interest are imposed, pursuant to Subsections 212.12(2)(a) and 212.12(3), Florida Statutes (2001), they shall be payable and collectible by Respondent in the same manner as if they were a part of the tax imposed.

39. Subsection 120.569(2), Florida Statutes (2004), reads in pertinent part:

> (g) Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida. . . .

40. Subsection 120.57(1), Florida Statutes (2004), reads in pertinent part:

> (c) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. . . .

41. Subsection 90.803(18)(d), Florida Statutes (2004), Admissions, is a hearsay exception, if offered against a party and is a statement made by the party's agent concerning a matter within the scope of the agency or employment made during the

existence of the relationship. Counsel for Petitioner made a standing objection to the documents considered during the April 27, 2004, deposition of Schultz and entered into evidence that the documents speak for themselves. This objection is overruled. Another standing objection was lodged against Deposition Exhibit 2, citing lack of factual predicate. This tribunal is satisfied, from the whole of the matters testified to by Schultz in deposition, that the documents have been properly authenticated. As stated in Daniels v. State, 634 So. 2d 187, 192 (Fla. 3rd DCA 1994), "[a]uthentication is necessary to establish that the 'matter in question is what its proponent claims.'" See also § 90.901, Fla. Stat. (2004). This tribunal must evaluate each piece of evidence on its own merits since there is no specific list of authentication requirements. Justus v. State, 438 So. 2d 358 (Fla. 1983), cert. den. 465 U.S. 1052, 104 S. Ct. 1332, 79 L. Ed. 2d 726 (1984).

42. In this taxpayer contest proceeding brought by Petitioner, Respondent has met its burden of proof by making a showing of the factual and legal grounds upon which this assessment was grounded. This showing was made through the testimony of Respondent's auditor who explained the methodology used in calculating the tax assessment and by the documents contained within the audit file. The reconstructed revenue records of retail sales made by Petitioner when compared against

the total tax remitted to Respondent show a deficit. Likewise, Respondent's auditor determined the depreciation schedules, invoices, and other documents showing purchases made by Petitioner, did not indicate that the proper amount of sales tax had been paid by Petitioner.

43. Petitioner has not shown by a preponderance of the evidence that the assessment is incorrect. The president of Petitioner, Philip Furtney, admitted that its business activities included vending machine sales in the various bingo halls, but denied it operated snack bars. Petitioner's agents, however, described the business operations of vending machine and snack bar operations.

44. Under the general law of agency, a principal may be bound by the acts of his agent which are in the latter's apparent authority. 1 Fla. Jur., Agency, § 34.

45. The record in this case is replete with instances where agents of Petitioner, acting within the scope of their authority, described what the business activities of the corporation were and from where its revenue was derived (i.e. correspondence during the audit period from Schultz to Donna Underhill and John Henning, describing the audit progress and ultimate results; communications between Respondent's auditor and Schultz; reports by the accounting firm of Edward Arcara of reviewed financial statements made to the stockholder of

Petitioner describing their revenue sources as canteen and vending sales).

46. The leases, assignments, and assumptions which Petitioner introduced in evidence describe relationships between other entities, none of whom were the subject of this audit. Pondella Hall for Hire, Inc., did not merge with Eight Hundred, Inc., until late in the year 1995, after the audit had been completed and the NOI issued. None of these documents support Petitioner's claim that the audit and subsequent assessment are incorrect.

47. The schedule of income earned by Petitioner, by location, and by category of income was prepared by Petitioner. Eight of the 23 Applications for Sales and Use Tax Registrations filed by Petitioner with Respondent listed the major business activity as restaurant, snack bar, or canteen.

48. The evidence is not convincing that Petitioner's assertion that the category "canteen" really meant "rent," as testified to by Furtney, or that the eight sales tax registrations were either mistakes or intentional registrations but for other persons working under Petitioner's corporate structure.

49. Petitioner's Exhibit 1, a spread sheet with calculations of sales tax subgroup "canteen" removed from total revenues, was prepared by Petitioner's witness Richard

Rabanzinski. Rabanzinski testified that he did not know for a fact whether the item listed as "canteen" was canteen sales or canteen rent, it was just automatically removed from the revenue work papers.

50. Assuming, arguendo, that the income listed as "canteen" was recognized as "rent," it is still taxable as a commercial lease under Section 212.031, Florida Statutes (2003). Petitioner claims these leases to be exempt under Subsection 212.031(10), Florida Statutes (2003). Exemptions to the taxing statutes are special favors granted by the Legislature and are to be strictly construed against the taxpayer. State ex. rel. Szabo Food Services, Inc. of North Carolina v. Dickinson, 286 So. 2d 529, 530-31 (Fla. 1973); Wanda Marine Corporation v. State, Department of Revenue, 305 So. 2d 65, 69 (Fla. 1st DCA 1974). It is well settled that one who would shelter himself under an exemption clause contained in a taxing statute must clearly show that he is entitled under the law to such exemption. Green v. Pederson, 99 So. 2d 292, 296 (Fla. 1957). Reviewing Subsection 212.031(10), Florida Statutes (2001), as it existed during the audit period, no evidence was introduced to show that the property leased was within the premises of a movie theater; a business operated under a permit issued pursuant to Chapters 550 or 551, Florida Statutes (1995); or any public-owned arena, sports stadium, convention hall, exhibition hall,

auditorium or recreational facility. In addition, Petitioner's interpretation that the phrase "publicly owned" in Subsection 212.031(10), Florida Statutes (1995), refers only to an "arena," is incorrect. It should be read to modify each of the terms which follows the phrase.

51. Petitioner has not introduced persuasive evidence to support its claim that it was unaware of the proposed tax assessment. The NOI, which is the precursor to the NOPA was mailed to the office of their agent, David L. Schultz in July 1995. That it was received is demonstrated by the letter subsequently written to Respondent seeking an abatement of interest and penalty. Notice to the agent is notice to the principal where knowledge is possessed or notice received by the agent within the scope of his authority. Connelly v. Special Road and Bridge District No. 5, 99 Fla. 456, 126 So. 794 (Fla. 1930).

52. Unless and until the issues relating to this audit were resolved, the outstanding tax liability remained. Although the informal conference which Schulz requested in his July 18, 1995, letter was not provided, this does not excuse Petitioner from not following up with Respondent on its own. A company ignores a $89,730.71 assessment at its own peril.

53. The testimony at hearing established that the NOPA was dated days after a search warrant had been served on

Petitioner's business. This fact conclusively refutes Petitioner's allegation that the execution of the search warrant prevented Petitioner from receiving notice and that this was an intentional act by state agents. There was no indication that the mail was not received. Businesses may close down, but mail is either forwarded or returned undelivered. Neither occurred in this instance. The general presumption is that mail properly addressed, stamped, and mailed was received by the addressee and proof of general office practice satisfies the requirement of showing due mailing. Brown v. Giffen Industries, Inc., 281 So. 2d 897, 900 (Fla. 1973).

54. Respondent is authorized to compromise tax or interest, if any of the criteria in Subsection 213.21(3), Florida Statutes (2001), exist, including doubt as to liability or collectibility of tax or interest. There has been no showing by Petitioner that the criteria in Subsection 213.21(3), Florida Statutes (2001), has been met.

55. Penalties may be settled or compromised if it is determined by Respondent that noncompliance is due to reasonable cause and not to willful negligence, willful neglect, or fraud. The term "may" denotes a permissive, rather than mandatory term. Harper v. State, 217 So. 2d 591 (Fla. 4th DCA 1968). On page 20 of the Standard Audit Report, Respondent's auditor did not recommend any compromise of penalty. Petitioner did not

introduce any evidence which would support a finding in favor of compromising the tax, interest, or penalty.

RECOMMENDATION

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

RECOMMENDED that a final order be entered by Respondent, Department of Revenue, upholding its assessments in the NOR dated November 16, 2001, for sales and use tax, the applicable surtax, plus applicable penalty and interest against Petitioner.

DONE AND ENTERED this 26th day of April, 2005, in Tallahassee, Leon County, Florida.

DANIEL M. KILBRIDE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 26th day of April, 2005.

COPIES FURNISHED:

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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.