STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

U.F., INC., d/b/a ULTIMATE FANTASY LINGERIE,	)	
Petitioner,	)	
vs.	)	Case No. 02-0686
DEPARTMENT OF REVENUE,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on May 2, 2002, in Clearwater, Florida, before T. Kent Wetherell, II, the designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Thomas C. Little, Esquire
Thomas C. Little, P.A.
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Clearwater, Florida 34625

For Respondent: R. Lynn Lovejoy, Esquire
Office of the Attorney General
The Capitol, Tax Section
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STATEMENT OF THE ISSUES

Whether sales tax and local government infrastructure surtax is due on the lingerie modeling session fees received by

Petitioner, and, if so, whether the Department of Revenue should compromise any portion of the tax, interest, or penalty assessed against Petitioner.

PRELIMINARY STATEMENT

On October 26, 2000, the Department of Revenue (Department or Respondent) issued a notice of proposed assessment resulting from a sales tax audit of Petitioner for the period of May 1, 1995, through April 30, 2000 (the audit period). The notice informed Petitioner that it owed sales and use tax for the audit period in the amount of $34,418.81, plus interest and penalty, as well as local government infrastructure surtax for the audit period in the amount of $5,736.48, plus interest and penalty. The assessments were attributable to the fees received by Petitioner for the lingerie modeling sessions that occurred in Petitioner's store during the audit period.

Petitioner protested the assessments through the Department's internal appeal process. See Rule 12-6.003, Florida Administrative Code. By letter dated December 17, 2001, the Department issued its final denial of Petitioner's protest and upheld the original assessments in full.

On February 13, 2002, Petitioner timely requested a formal administrative hearing to challenge the Department's decision. On February 15, 2002, the Department referred the case to the Division of Administrative Hearings (Division) for the

assignment of an administrative law judge to conduct the hearing requested by Petitioner.

The hearing was held on May 2, 2002. At the hearing, Petitioner presented the testimony of Peter Ristorcelli, Petitioner's accountant, and Steve Smith, Petitioner's owner and president during the audit period. Petitioner did not offer any exhibits. At the hearing, the Department also presented the testimony of Mr. Smith, as well as the testimony of Charles Wallace, an attorney in the Department's technical assistance and dispute resolution section, and George Watson, a tax audit supervisor with the Department. The Department offered two exhibits, R1 and R2, both of which were received into evidence without objection.

The Transcript of the hearing was filed with the Division on May 17, 2002. In accordance with Rule 28-106.216, Florida Administrative Code, the parties' proposed recommended orders were due 10 days after that date. The Department timely filed its Proposed Recommended Order on May 28, 2002. Petitioner filed its Proposed Recommended Order on June 6, 2002. The Department's motion to strike Petitioner's late-filed Proposed Recommended Order was denied, and the parties' Proposed Recommended Orders were considered by the undersigned in preparing this Recommended Order.

FINDINGS OF FACT

Based upon the testimony and evidence received at the hearing, the following findings are made:

1. Petitioner was established as a Florida corporation in November 1992. At the time of its incorporation, Petitioner's name was Ultimate Fantasy of Pinellas, Inc. Subsequently, the name was changed to U.F., Inc.

2. Petitioner is an "S Corporation," having filed the required election pursuant to Section 1362 of the Internal Revenue Code in June 1994.

3. Steve Smith was the sole shareholder and president of Petitioner during the audit period. Mr. Smith sold his interest in Petitioner in January 2002.

4. Starting on October 1, 1994, Petitioner leased space for its business in a small shopping center at 8248 Ulmerton Road, in unincorporated Pinellas County. Petitioner's store was less than 1,000 square feet in size.

5. Petitioner's lease included the following schedule of lease payments due from Petitioner to the lessor:[1]

Period	Rent	Sales Tax (7%)	Total
10/1/94 - 9/30/96	$585.00	$40.95	$625.95
10/1/96 - 9/30/98	$605.00	$42.35	$647.35

10/1/98 - 9/30/99	$630.00	$44.10	$674.10
4/1/00 - 3/31/02	$670.00	$46.90	$716.90

6. The record does not include receipts showing that Petitioner actually made those lease payments. However, Mr. Smith testified that Petitioner made those payments, and the weight of the evidence clearly supports the inference that the payments were made. Specifically, Petitioner claimed a deduction for rent expenses on its federal income tax returns in amounts comparable to that set forth above, and Petitioner was actually operating its business at the location specified in the lease during the audit period.

7. Petitioner made payments of $2,288.65 in sales tax to the lessor during the course of the audit period, computed as follows:

Period	Sales Tax Amount	Months	Total
5/1/95 - 9/30/96	$40.95	17	$ 695.15
10/1/96 - 9/30/98	$42.35	24	$1,016.40
10/1/98 - 9/30/99	$44.10	12	$ 529.20
4/1/00 - 4/30/00	$46.90	1	$ 46.90

8. Petitioner's lease stated that Petitioner would use the premises "as a retail store and for no other uses whatsoever."

That limitation was apparently waived by the landlord because the lingerie modeling conducted in Petitioner's store required an adult entertainment permit from Pinellas County and the landlord's consent was required for Petitioner to obtain a permit.

9. Petitioner's business includes the retail sale of lingerie as well as charging patrons a fee to watch lingerie modeling sessions which occur in Petitioner's store.

10. Patrons are not charged to come into Petitioner's store. They are free to come in, look at merchandise, purchase merchandise, and/or leave. However, a patron who comes into Petitioner's store and wants to see a piece of lingerie modeled pays a fee to Petitioner.

11. The fee is $30.00 per session, with a session lasting no more than a half hour. With a discount coupon, the fee was $20.00 per session. No sales tax was collected or remitted on those amounts.

12. After the patron pays the fee to Petitioner, he then identifies the lingerie to be modeled and a model does so. The patron compensates the model for the session through tips. Neither Petitioner, nor any of its employees are involved in that transaction.

13. The patron is not required to purchase the lingerie that is modeled and, as evidenced by the small amount of sales

on which Petitioner paid tax during the audit period, such purchases rarely occurred.

14. If the lingerie is purchased, Petitioner collects sales tax from the purchaser and remits it to the Department. If the lingerie is not purchased, it goes back into Petitioner's inventory.

15. Almost all of Petitioner's income over the course of the audit period was derived from the lingerie modeling sessions.

16. On the quarterly sales tax reports filed with the Department, Petitioner reported gross sales of $556,733.83 between May 1995 and December 1999. Of that amount, $554,829.88, or 99.65 percent, was from the fees for the lingerie modeling sessions and was reported as exempt sales. Only $1,978.57, or 0.35 percent, was reported as taxable lingerie sales.

17. The women who model the lingerie are not employees of Petitioner. They are not paid anything by Petitioner, nor do they pay Petitioner anything. Petitioner did provide security for the models.

18. The modeling sessions occurred in "segregated areas" of the store. They did not occur behind closed doors, behind a curtain, or in separate rooms, as that is prohibited by the Pinellas County Code.[2]

19. The "segregated areas" accounted for approximately 85 percent of the store's floor space. Thus, it is possible that a session could be observed from a distance by persons other than the patron who paid a fee to Petitioner. However, only the patron who pays the fee can view the modeling session in the "segregated areas" where the model performs.

20. Before Petitioner opened for business, Mr. Smith contacted an accountant, Peter Ristorcelli, to provide accounting and tax services to Petitioner. Those services included compliance with Florida's sales tax laws.

21. Mr. Ristorcelli had never worked for a client whose business was similar to that of Petitioner. Accordingly, Mr. Ristorcelli advised Petitioner to obtain guidance from the Department when he registered as a dealer and obtained a sales tax number.

22. Mr. Smith went to the Department's Clearwater office pursuant to Mr. Ristorcelli's advice. While there, he explained the type and operation of Petitioner's business and asked whether sales tax was due on the receipts from the modeling sessions. Mr. Smith was told by an unknown Department employee that the receipts from the modeling sessions were not subject to the sales tax, but that they should be reported as exempt sales. Mr. Smith was also told that receipts from the sale of lingerie

should be reported as taxable sales, and that sales tax should be collected on those sales.

23. Mr. Smith conveyed this information to Mr. Ristorcelli who then confirmed it with Bonnie Steffes, an employee in the Department's sales tax collection division in the Clearwater office with whom Mr. Ristorcelli had prior dealings.

24. In their conversations with the Department employees, both Mr. Smith and Mr. Ristorcelli fully explained the nature and manner of operation of Petitioner's business. Those explanations were not made in writing, nor were the Department's responses. Ms. Steffes is no longer employed by the Department, and she was not called as a witness at the hearing because she could not be located. Thus, the record does not contain any corroboration of the self-serving testimony of Mr. Smith and Mr. Ristorcelli on these events. Nevertheless, the undersigned finds their testimony to be credible.

25. Petitioner followed the advice Mr. Smith and Mr. Ristorcelli received from the Department.

26. Petitioner reported the receipts from the modeling sessions as exempt sales and did not collect or remit sales tax on those receipts. As stated above, Petitioner reported $554,829.88 in receipts from the modeling sessions for the period of May 1995 through December 1999.

27. Petitioner reported the receipts from the sales of lingerie as taxable sales and collected and remitted sales tax on those receipts. As stated above, Petitioner reported taxable sales of $1,978.57, and it collected and remitted sales tax in the amount of $138.58 for the period of May 1995 through December 1999.

28. Had Mr. Smith been told that the lingerie modeling sessions were taxable, he would have collected sales tax from the patron and remitted it to the Department.

The Department's Audit

29. On June 1, 2000, the Department gave Petitioner notice of its intent to conduct a sales tax audit on Petitioner's books and records for the audit period of May 1, 1995, to April 30, 2000.

30. The audit was conducted by Jose Bautista, a tax auditor in the Department's Clearwater office. Mr. Bautista reviewed Petitioner's books and records and spoke with Mr. Ristorcelli and Mr. Smith on several occasions.

31. In conducting the audit, Mr. Buatista utilized standard methods of assessment and followed the Department's rules and practices. He relied on the facts presented to him by Mr. Smith and Mr. Ristorcelli regarding the operation of Petitioner's business and, more specifically, the form and nature of the lingerie modeling transactions.

32. The audit did not identify any underreporting of taxable lingerie sales, nor did it find any underreporting of the receipts from the modeling sessions. In this regard, the proposed assessment (discussed below) was simply based upon the Department's determination that the receipts from the lingerie modeling sessions were taxable, not exempt from taxation.

33. The audit working papers indicate receipts of $573,642.89 upon which sales tax was not paid over the course of the audit period. That amount is solely attributable to the receipts from the modeling sessions over the audit period, as identified in the Department's audit.

34. That amount does not correspond with the receipts for the modeling sessions reported to the Department by Petitioner on its periodic sales tax returns. As stated above, Petitioner reported exempt sales from the modeling sessions in the amount of $554,829.88 for the period of May 1995 through December 1999. For that same period, the audit working papers show receipts from the modeling sessions as being only $540,460.32, calculated as follows:

Grand Total for Audit Period (5/95 - 4/00)			$ 573,642.89
Less:	April 2000	($7,177.49)	
	March 2000	(8,208.15)	
	February 2000	(8,872.59)	
	January 2000	(8,924.34)	
			(33,182.57)
Total for Period Of 5/95 - 12/99			$ 540,460.32

35. This discrepancy works in Petitioner's favor. Had the Department simply based its assessment on the amount reported by Petitioner as exempt sales between May 1995 and December 1999 ($554,829.88), and then added the receipts for the period of January 2000 through April 2000 ($33,182.57), the amount upon which Petitioner would have owed sales tax would have been $588,012.45 rather than $573,642.89 as found in the Department's audit.

36. Based upon the audit conducted by Mr. Bautista, the Department issued a Notice of Intent to Make Audit Changes (Notice of Intent) on August 16, 2000.

37. The Notice of Intent assessed a total tax deficiency of $40,155.29, which included a sales tax deficiency of $34,418.81 and a local government infrastructure surtax deficiency of $5,736.78. Those amounts were calculated in accordance with the standardized, statutory methods of calculation.

38. Petitioner does not contest the calculation of the tax deficiency.

39. The Notice of Intent also assessed interest and penalty. The interest and penalty were calculated on the amount of the tax deficiency pursuant to standardized, statutory methods of calculation.

40. Petitioner does not contest the calculation of the interest or penalty.

41. Petitioner, through Mr. Ristorcelli, sought administrative review of the Notice of Intent. That review is conducted at the district office level, which in this case was Clearwater. George Watson supervised the review. No changes were made based upon the review, and on October 26, 2000, the Department issued a Notice of Proposed Assessment which formally assessed the tax deficiency, interest, and penalty described above against Petitioner.

42. Petitioner, through Mr. Ristorcelli, protested the Notice of Proposed Assessment, and on July 5, 2001, the Department issued its Notice of Decision rejecting the protest. The review which resulted in the Notice of Decision was conducted in Tallahassee by Charles Wallace. The Notice of Decision upheld the tax deficiency, interest, and penalty in full.

43. Petitioner, through Mr. Ristorcelli, sought reconsideration of the Notice of Decision. On December 17, 2001, the Department issued its Notice of Reconsideration which again upheld the proposed assessment in full and refused to compromise any portion of the tax, interest, or penalty.

44. The legal basis for the assessments asserted by the Department in the Notice of Intent and Notice of Proposed

Assessment was that the fee paid to Petitioner by a patron to view a lingerie modeling session was an admission charge.

45. Based upon additional facts and clarifying information presented to the Department by Petitioner through the protest process, the Department concluded that the fee charged by Petitioner was more akin to a license to use real property and therefore taxable as such. That is the legal position asserted by the Department in its Notice of Decision and its Notice of Reconsideration. That legal position was also argued by the Department at the hearing and in its Proposed Recommended Order.[3]

46. Despite the change in the legal basis of the assessment, the amount of the assessment set forth in the Notice of Reconsideration is the same as the amount set forth in the Notice of Intent and Notice of Proposed Assessment. It was still based upon the full amount of the receipts from the lingerie modeling sessions (as determined by the audit) which had been reported as exempt sales.

CONCLUSIONS OF LAW

47. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding pursuant to Sections 72.011(1), 120.569, and 120.57(1), Florida Statutes. (All references to Sections and Chapters are to the Florida Statutes. All references to Rules are to the Florida Administrative Code.)

48. In this proceeding, the Department has the initial burden of showing "that an assessment has been made against the taxpayer and the factual and legal grounds upon which [the Department] made the assessment." See Section 120.80(14)(b)2. However, Petitioner has the ultimate burden to prove by a preponderance of the evidence that the factual or legal basis for the assessment is unreasonable or incorrect. See Department of Revenue v. Nu-Life Health and Fitness Center, 623 So. 2d 747, 751-52 (Fla. 1st DCA 1992). And see Section 120.57(1)(j).

49. The Department met its initial burden of proof. The evidence shows that the Department made an assessment against Petitioner based upon an audit conducted pursuant to the Department's rules and standard procedures under the authority of Chapter 212, and that the assessment was supported by the facts available to the Department at the time of the audit. Thus, the burden now shifts to Petitioner to show that the Department's assessment is factually or legally incorrect.

50. Petitioner failed to show that the Department's audit was factually incorrect. The material facts relied upon by the Department in making its assessment and upholding the assessment in the Notice of Reconsideration were provided to the Department by Petitioner, and they are consistent with the facts found above. Moreover, Petitioner has not challenged the Department's determination of the amount of receipts upon which tax is due or

the Department's calculation of the tax, interest, and penalty on that amount.

51. Thus, central issue in this proceeding is whether the Department's audit was legally correct. Resolution of that issue turns on whether the receipts from the lingerie modeling sessions are subject to the sales and use tax and the local government infrastructure surtax.

Are the receipts from the lingerie modeling sessions subject to the sales and use tax or the local government infrastructure surtax?

Sales and Use Tax

52. The sales and use tax is imposed by Chapter 212. The declaration of legislative intent in Section 212.21(2) provides in relevant part:

> It is hereby declared to be the specific legislative intent to tax each and every sale, admission, use, storage, consumption, or rental levied and set forth in this chapter, except as to such sale, admission, use, storage, consumption, or rental as shall be specifically exempted therefrom by this chapter subject to the conditions appertaining to such exemption.

53. As the Florida Supreme Court noted in Department of Revenue v. Magazine Publishers of America, 565 So. 2d 1304, 1310 (Fla. 1990), "Section 212.21 makes it unmistakably clear that as between the imposition of the tax or the granting of an exemption, the tax shall prevail." But cf. Warning Safety Lights of Georgia, Inc. v. Dept. of Revenue, 678 So. 2d 1377,

1379 (Fla. 4th DCA 1996)("[I]t is a fundamental rule of construction that the authority to tax must be strictly construed against the taxing authority and in favor of the taxpayer and all ambiguities or doubts must be resolved in favor of the taxpayer.")(citing Maas Bros. v. Dickinson, 195 So. 2d 193 (Fla. 1967)).

54. The Department initially determined that Petitioner's receipts from the lingerie modeling sessions were taxable as "admissions." See Sections 212.02(1) and 212.04(1); Rule 12A-1.005. Subsequently, the Department shifted its position and determined that the receipts were taxable as licenses to use real property. See Sections 212.02(10)(i) and 212.031(1); Rule 12A-1.070(10) and (11). Because it is unclear as to whether the Department has abandoned its argument that the receipts are taxable as "admissions" (see Endnote 3), each potential basis of taxation is discussed below.

Admissions

55. Section 212.04(1)(a) provides that "every person is exercising a taxable privilege who sells or receives anything of value by way of admissions," and Section 212.04(1)(b) imposes a tax on that privilege at the rate of six percent of the admission price.

56. Section 212.02(1) broadly defines the term "admissions" to include:

> the net sum of money after deduction of any federal taxes for admitting a person or vehicle or persons to any place of amusement, sport, or recreation or for the privilege of entering or staying in any place of amusement, sport, or recreation, including, but not limited to, theaters, outdoor theaters, shows, exhibitions, games, races, or any place where charge is made by way of sale of tickets, gate charges, seat charges, box charges, season pass charges, cover charges, greens fees, participation fees, entrance fees, or other fees or receipts of anything of value measured on an admission or entrance or length of stay or seat box accommodations in any place where there is any exhibition, amusement, sport, or recreation, ...

(emphasis supplied). And cf. Rule 12A-1.005.

57. The phrase "place of amusement" is not defined in statute or the Department's rules. Thus, it should be given its plain and ordinary meaning. See Southwest Florida Water Management District v. Save the Manatee Club, Inc., 773 So. 2d 594, 599 (Fla. 1st DCA 2000).

58. A "place" is a "space or physical environment" and an "amusement" is "a pleasurable diversion." See Mirriam-Webster's Online Collegiate Dictionary, at http://www.m-w.com. The "segregated areas" where the lingerie modeling sessions occur certainly fit that definition, even if Petitioner's entire store might not. The modeling sessions themselves fit the definition of "exhibitions" or "shows." See id. (defining "exhibition" to

mean "a public showing" and defining "show" to mean a "display or exhibition arranged to arouse interest or stimulate sale").

59. That Petitioner does not control the "exhibition" or "show" performed by the model is immaterial. The "exhibition" or "show" occurs in Petitioner's store, and Petitioner collects a fee from patrons who want the privilege of viewing the modeling session.

60. The fee charged by Petitioner to have a lingerie modeling session is based upon a "length of stay," i.e., $20 or $30 per half hour. Payment of the fee affords the patron a privilege not afforded to those who come into Petitioner's store but do not pay the fee. Specifically, it allows the patron to enter and stay in the "segregated areas" of the store where the model performs and to interact with the model.

61. That patrons in the store who have not paid the fee might be able to observe the modeling session from a distance because the sessions do no occur in private rooms does not affect the taxability of the fees. As noted above, the fee affords the paying patron a privilege not afforded to those who do not pay the fee.

62. Accordingly, the fee collected by Petitioner is a sum of money measured on a length of stay, and it is charged for the for the privilege of entering or staying in a place of amusement

where there is an exhibition or show. Accordingly, the fee is an admission, as defined in Section 212.02(1).

63. The lingerie modeling session fees collected by Petitioner are not an incidental part of Petitioner's business. Indeed, the record reflects that more than 99 percent of Petitioner's income over the audit period came from such fees. Accordingly, Department of Revenue v. Camp Universe, Inc., 273 So. 2d 148 (Fla. 1st DCA 1973), cited by Petitioner, is distinguishable.

64. In light of the broad definition of "admissions" in current law, Petitioner's reliance on bills considered by the Legislature in 1996 and 2000 to amend that definition to specifically include references to "adult entertainment services" and "lingerie modeling" is misplaced.

65. Although the Legislature's failure to enact legislation is considered relevant in some circumstances, see Dept. of Insurance v. Insurance Servs. Office, 434 So. 2d 908 (Fla. 1st DCA 1983) (Legislature's consideration of, an refusal to enact, proposed legislation is "strong evidence" that agency was not authorized to promulgate rules dong what the Legislature refused to do),[4] it is generally not viewed as a reliable source when construing the meaning of existing law.

66. As the United States Supreme Court stated in Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994):

> [F]ailed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute. Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.

Id. at 187 (citations and internal quotations omitted).

67. In this case, the limited legislative history information introduced at the hearing is inconclusive, at best, regarding the intent and potential effect of the failed bills cited by Petitioner. Indeed, the analysis prepared by the Department on the bill proposed in 2000 noted that "the present definition of 'admissions' found in section 212.02(1), F.S., is sufficiently broad to include admissions to such establishments [i.e., those offering 'adult entertainment services']."

68. Accordingly, to the extent that the Department has not abandoned this argument, it is concluded that the fees received by Petitioner for the lingerie modeling sessions are taxable as admissions.

License to Use

69. Section 212.031(1)(a) provides that "every person is exercising a taxable privilege who engages in the business of

renting, leasing, letting, or granting a license to use real property," and Section 212.031(1)(c) imposes a tax on that privilege at a rate of six percent on the total rent or license fee.

70. The obligation to pay the tax on a license to use falls on the person granting the license, which in this case is Petitioner. See Section 212.031(2); S & W Air Vac Systems, Inc. v. Dept. of Revenue, 697 So. 2d 1313, 1314 n.1 (Fla. 5th DCA 1997) (citing Schurmacher Holding, Inc. v. Noriega, 542 So. 2d 1327 (Fla. 1989)).

71. Section 212.02(10)(i) defines "license" to mean "the granting of a privilege to use or occupy a building or a parcel of real property for any purpose." The Department's rules elaborate on that definition as follows:

> (10) When the owner of a business, or the operator of a business who is a lessee or licensee, provides floor space to any person, and in addition thereto and in connection therewith also provides certain services to such person such as display, delivery, wrapping, packaging, telephone, credit, collection, or accounting, the amount charged by the lessee or licensee to such person constitutes the lease or rental of or license to use or occupy real property, and where the charges for such services are not separately stated in the agreement and on the invoices or other billings, the total consideration paid under the agreement is taxable. . . . . When the operator of a business is a lessee or licensee, he may take credit in accordance with the provisions of subsection (8) of

> this rule, for the tax paid on the floor space which he subleases or assigns.
>
> (11) When the operator of a business, who may be the owner or prime lessee, provides space to an independent operator or licensee, the operator shall collect and remit tax on the total consideration paid by the independent operator or other person for the right of such person to occupy or use such space.

Rule 12A-1.070(10) and (11) (emphasis supplied).

72. The evidence establishes that Petitioner provides floor space in its store to the models to conduct lingerie modeling sessions. Although the model does not pay any consideration to Petitioner for use of that space, the patron -- who is also using the space to view the modeling session -- does pay a fee to Petitioner. By paying the fee, the patron receives a privilege not afforded to other persons who come into Petitioner's store but who do not pay the fee. Specifically, the patron is allowed to watch a lingerie modeling session in a "segregated area" of Petitioner's store and interact with the model.

73. That Petitioner does not control the "exhibition" or "show" performed by the model is immaterial. Compare Rule 12A-1.071(10) (d) (exercise of control by the licensor is important consideration in determining the taxability of a license to use tangible personal property) with Rule 12A-1.070 (identifying no similar consideration related to the taxability of licenses to

use real property). And cf. S & W Air Vac, supra (affirming order imposing tax under Section 212.031 against gas stations and convenience stores which permitted owners of coin-operated "air vac" machines to place the machines on the stores' property despite the fact that the stores exercised almost no control over the operation of the "air vac" machines).

74. In this regard, the fee paid by the patron grants him a privilege to use a portion of the floor space in Petitioner's store to view a lingerie modeling session. This constitutes a license to use, as defined in Section 212.02(10)(i) and Rule 12A-1.070(10) and (11). Therefore, the fees paid to Petitioner by the patrons are taxable under Section 212.031.

75. Lord Chumley's of Stuart, Inc. v. Dept. of Revenue, 401 So. 2d 817 (Fla. 4th DCA 1981), cited by Petitioner, is distinguishable. In that case, court reversed the Department's Final Order because the Department had rejected the hearing officer's factual finding that the taxpayer was not engaged in the business of renting real property despite the fact that the finding was supported by competent substantial evidence. Id. at 819. In this case, the evidence establishes that Petitioner is clearly (and almost exclusively) in the business of collecting a fee for the lingerie modeling sessions which occur in "segregated areas" of its store which, as discussed above, is a license to use. And cf. S & W Air Vac, supra (rejecting

argument that convenience stores were not in the business of granting licenses to use where they did not limit themselves to the sale of goods and derived income from a range of activities on their premises).

76. If, in its final order, the Department chooses to tax the receipts from the lingerie modeling sessions as a license to use real property (rather than as admissions), then it should grant Petitioner a credit in the amount of $1,945.35, i.e., $2,288.65 multiplied by 85 percent (see Findings of Fact 7 and 19), to reflect the pro rata portion of the sales tax paid by Petitioner to its landlord on the portion of the store where the lingerie modeling actually occurred. See Rule 12A-1.070(8), (10).

Local Government Infrastructure Surtax

77. The local government infrastructure surtax is a discretionary tax that a county may impose after approval of a referendum by the voters in the county. See Section 212.055(2). The surtax is imposed in Pinellas County at the rate of one percent.

78. The surtax is imposed in the same manner and on the same transactions that are subject to the sales tax. See Section 212.054(2)(a).

79. In light of the foregoing determination that the receipts from the lingerie modeling sessions are subject to the

sales and use tax, those receipts are also subject to the local government infrastructure surtax.

Should the Department compromise any portion of the tax or interest?

80. The Department is authorized, but not required, to compromise tax and interest "upon the grounds of doubt as to liability for or collectibility of such tax or interest." See Section 213.21(3)(a).

81. The Department's rules prescribe the factors that the Department is to consider when determining whether to compromise tax and interest. Specifically, Rules 12-13.005 and 12-13.006 provide:

> 12-13.005 Grounds for Finding Doubt as to Liability.
>
> . . . . Doubt as to liability is indicated when there is reasonable doubt whether an action is required in view of conflicting rulings, decisions, or ambiguities in the law, and the taxpayer has exercised ordinary care and prudence in attempting to comply with the revenue laws of this state.
>
> (2) Reasonable reliance upon the express terms of a written determination by the Department is one basis for doubt as to liability.
>
> * * *
>
> 12-13.006 Grounds for Finding Doubt as to Collectibility.
>
> Tax or interest or both will 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 unpaid 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 pursuant to the procedures in Rule 12-13.004, F.A.C.

(emphasis supplied).

82. The record does not establish a basis for finding "doubt as to liability." See Rule 12-13.005. The shift in the Department's position regarding the basis of taxation of the modeling sessions (i.e., admission or license to use) suggests that there may be some ambiguity in the law. However, aside from the non-binding oral advice received by Mr. Smith and Mr. Ristorcelli, the Department's position that the modeling sessions are taxable has not changed throughout this proceeding. Moreover, as discussed above, both of the Department's legal positions have ample support in the law.

83. Although the record establishes that Petitioner (through Mr. Smith) made a good faith effort to determine the taxability of the modeling sessions, given the significant percentage of Petitioner's business that involves lingerie modeling, Mr. Smith's reliance on what amounts to oral legal advice from a Department employee was not reasonable under the circumstances.

84. In this regard, the circumstances of this case are strikingly similar to those in Glass v. Department of Revenue, 650 So. 2d 684 (Fla. 5th DCA 1995). In that case, the court expressly rejected the taxpayer's argument that "he should not have to pay [sales] tax because DOR employees [orally] gave him misinformation" regarding the taxability of the transactions at issue. Id. at 685. There, as here, the taxpayer provided the initial representations regarding the operation of the business, and the "misinformation" provided by the Department employees were statements of law based upon details supplied by the taxpayer, not mistakes of material fact. Id. at 686. And see Dept. of Revenue v. Anderson, 403 So. 2d at 397, 400 (Fla. 1981) (equitable estoppel will be applied against the State only in "exceptional circumstances").

85. There is nothing in the record regarding the current financial status of the Petitioner. Therefore, there is no basis for a finding of "doubt as to collectability." See Rule 12-13.006.

86. Accordingly, the record does not establish a basis for the Department to compromise any portion of the tax or the interest.

Should the Department compromise any portion of the penalty?

87. The Department is authorized, but not required, to compromise a taxpayer's liability for penalties if it determines that "the noncompliance is due to reasonable cause and not to willful negligence, willful neglect, or fraud . . . ." See Section 213.21(3)(a).

88. The Department's rules prescribe the factors that the Department is to consider when determining whether "reasonable cause" exists to compromise a penalty. Specifically, Rule 12-13.007 provides in pertinent part:

> (2) Reasonable cause is indicated by the existence of facts and circumstances which support the exercise of ordinary care and prudence on the part of the taxpayer in complying with the revenue laws of this state. Depending upon the circumstances, reasonable cause may exist even though the circumstances indicate that slight negligence, inadvertence, mistake, or error resulted in noncompliance. Consideration will be given to the complexity of the facts and the difficulty of the tax law and the issue involved, and also to the existence or lack of clear rules or instructions covering the taxpayer's situation.
>
> (3) Ignorance of the law or an erroneous belief as to the need to comply with a revenue law constitutes reasonable cause when there are facts and circumstances which indicate ordinary care and prudence was exercised by the taxpayer.
>
> (a) For example, ignorance of the law or an erroneous belief held by the taxpayer is a basis for reasonable cause when the

taxpayer has a limited knowledge of business, a limited education, limited experience in Florida tax matters, or advice received from a competent advisor was relied upon in complying with the provisions of a revenue law.

(b) A good faith belief held by a taxpayer with limited business knowledge, limited education, or limited experience with Florida tax matters is a basis for reasonable cause when there is reasonable doubt as to whether compliance is required in view of conflicting rulings, decisions, or ambiguities in the law.

(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) Reasonable reliance upon the express terms of written advice given by the Department establishes 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. "Written advice" for purposes of establishing reasonable cause as a basis for compromise of penalties includes a writing issued to the same taxpayer by the Department in response to that taxpayer's request for advice. The determination whether the taxpayer has reasonably relied on such written advice will be made in accordance with the criteria for determining if a taxpayer has reasonably relied on a written determination for purposes of compromise of tax and interest as set forth in subsection 12-13.005(2), F.A.C.

(emphasis supplied).

89. Petitioner's failure to collect and remit sales tax on the lingerie modeling sessions is not due to willful negligence, willful neglect, or fraud. Indeed, the evidence establishes that Petitioner made a good faith effort to comply with the tax laws by soliciting advice from the Department and an accountant. However, the facts and circumstances of this case do not establish "reasonable cause" as that phase is narrowly construed in Rule 12-13.007.

90. Although Mr. Ristorcelli, the accountant whose advice Mr. Smith sought regarding the taxability of the lingerie modeling sessions, may be competent in Florida tax matters, he had no experience with the type of business engaged in by Petitioner. Accordingly, the only advice he gave Mr. Smith was

to consult with the Department. Moreover, Mr. Ristorcelli's advice was oral, not written, and it is not the type of advice referred to in Rule 12-13.007(4). Therefore, that advice does not provide a basis for a finding of "reasonable cause."

91. Similarly, the advice that Mr. Smith obtained from a Department employee (and that he and Mr. Ristorcelli later "confirmed") does not provide a basis for a finding of "reasonable cause" because it was oral, not written. See Rule 12-13.007(5). And cf. Rule 12-11.003(1) ("Oral opinions and advice issued by representatives of the Department are not binding on the Department."); Glass, 650 So. 2d at 686 (rejecting estoppel claim based upon advice of a Department employee that was a mistake of law).

92. Finally, as noted above, Mr. Smith's reliance on oral legal advice from the Department is not reasonable under the circumstances in light of the large percentage of Petitioner's income that was derived from lingerie modeling sessions. See Glass, supra.

93. Accordingly, the record does not establish a basis for the Department to compromise the penalty imposed on Petitioner.

RECOMMENDATION

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

RECOMMENDED that the Department of Revenue issue a final order that assesses tax, interest, and penalties, against Petitioner in the amounts set forth in the Notice of Reconsideration dated December 17, 2001; and, if the tax assessed in the final order is based upon Section 212.031 (license to use) rather than Section 212.04 (admissions), the Department should grant Petitioner a credit in the amount of $1,945.35, for the sales tax paid by Petitioner to its landlord on that portion of Petitioner's store where the lingerie modeling sessions occurred.

DONE AND ENTERED this 14th day of June, 2002, in Tallahassee, Leon County, Florida.

T. KENT WETHERELL, II
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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of June, 2002.

ENDNOTES

1/ The record does not contain any information on the period between October 1, 1999, and March 31, 2000. The original lease expired on September 30, 1999, and the addendum to the lease included in the record is for the period beginning April 1, 2000.

2/ Article III of Chapter 42 of the Pinellas County Code regulates adult uses. Sections 42-106 and 42-108 of the Code prescribe the operational requirements for adult use establishments such as Petitioner's business.

3/ At the hearing, and in its Proposed Recommended Order (PRO), the Department stopped short of abandoning its argument that the fees for the lingerie modeling sessions are taxable as admissions. Indeed, it argued in its PRO that "[s]ometimes licenses to use real property are also admissions."

4/ This case appears to reflect the minority view in Florida and, perhaps, even a minority view at the First District Court of Appeal. See Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Ass'n, Inc., 794 So. 2d 696, 704 n.8 (Fla. 1st DCA 2001) (citing conflicting cases, including conflicting cases in the First District Court of Appeal).

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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.