2.4.05

STATE OF FLORIDA DEPARTMENT OF REVENUE
TALLAHASSEE, FLORIDA

CARTER WOLF INTERIORS	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 04-4126
	)	(DOAH)
FLORIDA DEPARTMENT OF REVENUE	)	
	)	DOR CASE NO. 05-8-FOF
Respondent.	)	
	)	

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Closed

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 Division of Administrative Hearings assigned Administrative Law Judge Daniel Manry to the cause. He issued a Recommended Order on the 4th day of February, 2005, sustaining the Department's assessment. A copy of the Recommended Order is attached to this Final Order and incorporated to the extent described herein. Although the Petitioner neither appeared at the hearing on January 6, 2005, nor otherwise submitted any evidence, DOAH conducted the hearing at which time the Respondent called one witness and submitted two exhibits for admission into evidence. The Department timely filed a Proposed Recommended Order (PRO) with DOAH. Petitioner did not file a PRO but timely filed exceptions, a copy of which is attached to this Final Order. Likewise, the Respondent did not file responses to Petitioner's exceptions, but timely filed exceptions

to certain findings of fact in the Recommended Order, a copy of which is attached to the Final Order. The Petitioner filed no objections. The Department adopts and incorporates in this Final Order the Findings of Fact contained in paragraphs 1-5, 7, 8, 10, and 11 of the Recommended Order. Findings of Fact 6, 9, 15, and 18-21 are modified as reflected below. The Department adopts and incorporates in this Final Order the Conclusions of Law contained in paragraphs 12-14, 16, 17, and 22. The Conclusions of Law in paragraphs 15 and 18-21 are modified as reflected below. Rulings on the Petitioner's and Respondent's exceptions are set forth below.

STATEMENT OF THE ISSUE

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

PRELIMINARY STATEMENT

The Department adopts and incorporates in this Final Order the Preliminary Statement in the Recommended Order with the addition of the following paragraph.

All references to the hearing transcript in this case will be indicated by "TR [page number]:[line number];" viz "TR 123: 1-3" indicating page 123 of the final hearing transcript, lines one through 3. All references to exhibits in this case will be indicated by "E [exhibit number number]:[page number]" viz "RE 1: 10" indicating Exhibit number 1, page 10.

RULINGS ON PETITIONER'S EXCEPTIONS

While not stated as such, it appears that Petitioner in his exceptions numbered 1-12 is attempting to assert excusable neglect as the basis for his not appearing at the January 6th, 2005 hearing and as the basis for a rehearing on the merits. In paragraph 7, Petitioner states that the notice for the January hearing trial "had been sent to the incorrect addresses." In paragraph 9, he states that "[d]ue to the lack of proper notice of the trial, and their assumption that settlement discussions were ongoing, neither Mr. Carter nor Mr. Schlegel appeared at the January 6, 2005 trial." It was undisputed that the Petitioner's Notice of Hearing was sent both to the residence address of the president of the corporation as well as to the corporation. (Recommended Order paragraph 12). The United States Postal Service returned as undeliverable the Notice which had been sent to the corporate address, but the Notice mailed to the residence of the president was not returned (Recommended Order paragraph 12). The ALJ conducted the hearing because he found that service of process was properly addressed to the president, stamped, mailed and not returned. This constituted adequate notice of the administrative hearing (Recommended Order paragraphs 13 and 14). While Petitioner asserts the Notice of Hearing was addressed incorrectly, certainly he provides no affidavit or other proof that would support his allegation he did not get the Notice of Hearing. The fact the Recommended Order was sent to the same address as the Notice of Hearing and the fact the Petitioner timely filed exceptions thereto, leads us to the inescapable conclusion that Petitioner in fact had notice of the hearing. Therefore the Petitioner's exception addressing his lack of receipt of Notice of Hearing that arguably attempts to modify or reject paragraphs 12 –14 of the Recommended Order, is rejected.

Petitioner in the alternative pleads that unusual circumstances prevented him from appearing at trial (e.g. Paragraph 1 where Petitioner asserts he was hospitalized "a number of times since the beginning of Summer 2004" as a result of HIV/AIDS; paragraph 2 where Petitioner asserts he filed for personal bankruptcy as a result of an employee that had embezzled company funds. This added stress and "otherwise distracted him from ongoing proceedings; paragraph 7 where Petitioner asserts that unbeknownst to him, the Certified Public Accountant that was representing him "was refusing to continue her representation.")

Some courts previously have invoked equitable doctrines such as excusable neglect or equitable tolling to grant untimely requests for administrative hearings or to remand cases. see e.g. . Rothblatt v. Department of Health and Rehab. Srvs. 520 So. 2d 644 (Fla 4th DCA 1988); Unimed Lab., Inc. v. Agency for Health Care Admin., 715 So. 2d 1036 (Fla. 2d DCA 2002). However, these cases are no longer controlling. In Cann v. Department of Children and Family Services, 813 So. 2d 237 (Fla. 2d DCA 2002), the Second District held that excusable neglect no longer was permitted where Plaintiffs filed untimely petitions for hearing. This case essentially overruled prior decisions that allowed untimely requests for hearings to be granted where excusable neglect was present. The court concluded the 1998 amendments to section 120.569(2)(c), Florida Statutes overruled Unimed Lab., Inc. and Rothblatt, since the law now provides that, "a petition shall be dismissed if it. . . has been untimely filed. . ."

Nonetheless, the Cann Court specifically recognized the Florida Supreme Court opinion, Machules v. Dep't of Amin., 523 So. 2d 1132 (Fla. 1988), that authorized equitable tolling in limited circumstances. In that case, the Florida Supreme Court

stated, "Generally, the [equitable] tolling doctrine has been applied when the plaintiff has been misled or lulled into inaction, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights mistakenly in the wrong forum." Id at 1134.

While the explanations offered by the Petitioner in his exceptions 1-12 are noteworthy, there has been no assertion that Petitioner was misled or lulled into inaction, that he was in some extraordinary way prevented from asserting his rights, or that he mistakenly asserted his rights in the wrong forum. Therefore equitable tolling does not apply. For the reasons stated above, the Department rejects Petitioner's exceptions as to the extent they are attempting to reject, modify or except the Hearing Officer's Findings of Fact or Conclusions of Law.

Attached to Petitioner's exception is a memorandum providing three arguments arguing against the application of the state sales tax at issue. Again, the Petitioner does not state the portions of the Recommended Order he is seeking to except, although it appears he is disputing the Findings of Fact paragraphs 7 and 8 and Conclusion of Law paragraph 18. Petitioner proffers new exhibits in his memorandum and attempts to introduce other new evidence. Case law is clear, however, that agencies are without power to supplement evidence in a final order that could have been provided at hearing. Prysi v. Dept. of Health, 823 So. 2d 823 (Fla. 1st DCA 2002); Lawnwood Med. Ctr. v. Agency for Health Care Admin., 678 So. 2d 421 (Fla. 1st DCA 1996). Therefore, the agency cannot accept or consider new evidence or exhibits otherwise not in the record. Petitioner asserts the auditor erred in taxing decorator and design services involving the sale of tangible personal property, because according to Petitioner, those contracts should

appropriately have been labeled "real property." However, nothing in the record would support Petitioner's position. In fact, at trial the auditor testified she reviewed each invoice and made a determination that the Petitioner sold tangible personal property along with design services (TR 27:14-25; 28:1-9). The auditor did not determine that any of the property sold constituted "real property" and there was no testimony to the contrary. For the reasons set forth above, the Department would reject Petitioner's first exception that the contracts were "real property."

Issue 2 in Petitioner's exception is equally vague as to which paragraph it is seeking to except from the Recommended Order. The argument appears to be directed to Findings of Fact numbered 4 and 9 in the Recommended Order. The Petitioner disputes the methodology used by the auditor to determine the amount of tax due. Petitioner asserts the sampling period was bad, the auditor's work was sloppy, and the sampling method was not agreed upon. Contrary to Petitioner's assertions, at trial the auditor testified that while the dates of the sampling period were changed, the change applied only to a portion of the audit and was approved by the Petitioner's controller (TR 15: 15-25; 16: 1-9). There is nothing on the record that would support Petitioner's assertions to the contrary. For the reasons stated above, the Department rejects Petitioner's Issue 2.

Petitioner, in Issue 3, disputes the auditor's decision to employ a sampling methodology instead of considering each year in detail. This argument seems to be directed to Finding of Fact paragraph 4 of the Recommended Order. During the final hearing, Respondent entered as an exhibit a copy of a document titled "Audit Agreement" signed by both the Petitioner and the auditor. This document informs the taxpayer that the audit would be done on a sample basis. The auditor testified that the Petitioner

accepted the sample methodology (TR 14: 9 – 19). In looking at the totality of the record, there is nothing that disputes this. For the reasons stated above, the Petitioner's exception to paragraph 4 is rejected.

RULINGS ON RESPONDENT'S EXCEPTIONS

Section 120.57(1)(l), Florida Statutes, clearly states a hearing officer's findings of fact cannot be modified, or rejected "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law." In addition, an administrative agency may not reject the hearing officer's finding unless there is no competent, substantial evidence from which the finding could reasonably be inferred. Greseth v. Department of Health & Rehabilitative Services, 573 So. 2d 1004 (Fla. 4th DCA 1991). It is well settled in case law that substantial evidence is such evidence as establishes a substantial basis of fact from which the fact at issue can be reasonably inferred or that a reasonable mind would accept as adequate to support a conclusion DeGroot v. Sheffield, 95 So. 2d 912 (Fla. 1957).

In accordance with Section 120.57 (1)(l), Florida Statutes, the Department has reviewed the entire record and has determined that certain dates contained within the Findings of Fact and Conclusions of Law paragraphs 6, 9, 15 and 18-21 are not based on competent substantial evidence. The dates listed in the Recommended Order for which the Respondent seeks exception do not correspond to the undisputed testimony and

evidentiary exhibits presented at the Final Hearing. In fact, the dates contained in Recommended Order itself are internally inconsistent.

Respondent's Exception to Finding of Fact paragraph 6

The Department agrees with Respondent that the undisputed facts from the record show that the differences in the amounts reported by the Petitioner in his state form and federal form were divided by each year individually, and then scheduled and assessed for that particular year. (TR 23: 24-14; 24:1-8; RE 1: 49; 52-56) They were not aggregated and then scheduled and assessed. For that reason, "from 1996 through 1997" should read, "in 1996, 1997, and 1999."

Respondent's Exception to Finding of Fact paragraph 9

The Department agrees with Respondent that the undisputed facts show that the auditor assessed the amount of taxable design fees for each year of the audit period, which was from May 1, 1995 through April 30, 2000. (RE: 1: 57-66.) Therefore, the Department correctly requests the Recommended Order be modified to read, "for 1995 through 2000", instead of "for 1997, 1998, and 1999."

Respondent's Exception to Conclusions of Law paragraphs 15, 20, and 21

The Department agrees with Respondent that the undisputed facts in the record show that the audit period was May 1, 1995 through April 30, 2000. (RE:1:1, 9, 12, 18, 21, 23, 26, 28, 29, 38, 44-66) and that the Recommended Order should read "for 1995 through 2000" instead of "for 1997, 1998, and 1999."

Respondent's Exception to Conclusions of Law paragraphs 18 and 19

The Department agrees with Respondent that the undisputed facts in the record show that the years in which the Petitioner had unreported sales were 1996, 1997, and

1999 (TR 25:7-20; RE : 1: 49-51, 71, 75, 83, 97-98). Therefore paragraphs 18 and 19 of the Recommended Order should read, "For 1996, 1997, and 1999" instead of, "For 1997, 1998, and 1999."

For the reasons set forth above, the Department determines the Findings of Fact and the Conclusions of Law of the Recommended Order discussed in Respondent's Exceptions above were not based upon competent substantial evidence. The Department therefore modifies the Recommended Order by amending the dates as suggested by Respondent's exceptions in paragraphs 5-11 and as identified above.

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 16th day of May, 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 Statues, 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.

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