

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CARTER WOLF INTERIORS, INC.,)
)
 Petitioner,)
)
vs.) Case No. 04-4126
)
DEPARTMENT OF REVENUE,)
)
 Respondent.)

)

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the administrative hearing of this case on January 6, 2005, in Orlando, Florida, on behalf of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: No Appearance

For Respondent: James O. Jett, Esquire
Office of the Attorney General
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

STATEMENT OF THE ISSUES

The issues for determination are whether Respondent should assess tax, interest, and penalty on gross sales that Petitioner reported in Petitioner's federal income tax returns, but not in Petitioner's state sales tax returns; and on gross sales of

services in transactions that also involved sales of tangible personal property.

PRELIMINARY STATEMENT

Upon completion of an audit, Respondent determined that Petitioner owed tax, penalty, and interest in the amount of \$148,019.89 through August 15, 2001. Petitioner requested an administrative hearing, and Respondent referred the matter to DOAH to conduct the administrative hearing.

At the hearing, Petitioner neither appeared nor otherwise submitted any evidence. Respondent called one witness and submitted two exhibits for admission into evidence.

The identity of the witness and exhibits, and the rulings regarding each, are reported in the one-volume Transcript of the hearing filed with DOAH on January 12, 2005. Respondent timely filed a proposed recommended order (PRO) on January 21, 2005. Petitioner did not file a PRO.

FINDINGS OF FACT

1. Petitioner was a Florida corporation from May 1, 1995, through April 30, 2000 (the audit period). Petitioner maintained its principal place of business at 153 East Morse Boulevard, Winter Park, Florida 32789, and engaged in the business of providing services for interior design and decorating and selling tangible personal property used in the design and decoration of properties. On October 10, 2004, the

Department of State, Division of Corporations, administratively dissolved Petitioner for failure to file Petitioner's annual report.

2. Petitioner's federal employer identification number during the audit period was 59-2706005. Petitioner reported income and deductions for purposes of the federal income tax using the cash method of accounting.

3. During the audit period, Petitioner was a registered dealer and filed a monthly Sales and Use Tax Return (DR-15) with Respondent. On June 2, 2000, Respondent sent Petitioner a Notification of Intent to Audit Books and Records (Form DR-840) bearing audit number A9933414838.

4. Respondent and Petitioner agreed that a sampling method would be the most effective, expedient, and adequate method in which to audit Petitioner's books and records. Respondent examined and sampled the available books and records to determine whether Petitioner properly collected and remitted sales and use tax in compliance with Chapter 212, Florida Statutes (1993).

5. For 1996, 1997, and 1999, Petitioner reported fewer gross sales on the DR-15s used for the purpose of the state sales tax than Petitioner reported on its Form 1120S federal income tax return. Respondent determined that the difference between gross sales reported for purposes of the state and

federal taxes constituted unreported sales on which Respondent was statutorily required to assess sales tax, penalty, and interest.

6. Respondent's auditor divided the yearly differences in the amounts reported on the Form 1120S and the DR-15s to determine a monthly difference for each month from 1996 through 1997. The auditor then scheduled the monthly difference and assessed the tax appropriately.

7. The auditor also assessed tax for the value of design services that Petitioner provided to customers when Petitioner sold the customers design services and tangible personal property as a part of the same transaction. Pursuant to an agreement between Petitioner and Respondent's auditor, the sample included the entire year in 1999.

8. Petitioner collected sales tax on all sales of tangible personal property, but did not collect sales tax on fees charged for decorator and design services provided in the same transactions. Respondent is authorized by rule to assess sales tax on the value of services provided in the same transaction in which Petitioner sold tangible personal property.

9. The auditor correctly divided the total taxable design fees invoiced for 1999 by the total invoiced amount per sales by customer detail. The resulting quotient of .0752 percent was the applicable percentage of the design fees that were taxable

in 1999. The auditor multiplied the applicable percentage by the gross sales that Petitioner reported on its federal tax returns for 1997, 1998, and 1999 to determine the total amount of design fees that were taxable. The auditor then properly scheduled and assessed the taxable interior design fees.

10. On May 1, 2001, Respondent issued a Notice of Intent to Make Audit Changes (form DR-1215). The Notice provided that Petitioner owed \$77,249.72 in taxes; \$38,625.02 in penalties; and \$29,471.12 in interest, for a total deficiency of \$145,345.86. Interest continued to accrue on the unpaid assessment.

11. On August 15, 2001, Respondent issued its Notice of Proposed Assessment. The Notice provided that Petitioner owed: \$77,249.72 in taxes; \$38,625.02 in penalties; and \$32,145.15 in interest, for a total of \$148,019.89 through August 15, 2001.

CONCLUSIONS OF LAW

12. DOAH has personal jurisdiction over the parties. DOAH provided the parties with adequate notice of the administrative hearing. Although the Notice of Hearing sent to Petitioner by United States Postal Service was returned as undeliverable, the separate Notice of Hearing that DOAH mailed to the residence address of Petitioner's President was not returned.

13. Service of process on a corporation is sufficient if served on the president or vice-president of the corporation.

§ 48.081, Fla. Stat. (2004); see also Stewart v. Julana Development Corp., 678 So. 2d 1385, 1388 (Fla. 3rd DCA 1996). Service of process on a corporation dissolved after July 1, 1990, is the same as service of process on any other corporation. § 48.101, Fla. Stat. (2004).

14. The Notice of Hearing sent to the residence address of the corporate president was properly addressed, stamped, and mailed and was not returned. Mail properly addressed, stamped, and mailed is presumed to be received by the addressee if not returned. Brown v. Giffen Industries, Inc., 281 So. 2d 897, 900 (Fla. 1973).

15. DOAH has subject matter jurisdiction over the proposed assessment for 1997, 1998, and 1999, pursuant to Subsections 120.57(1) and 213.67(7), Florida Statutes (1996). The proposed assessment affects the substantial interests of Petitioner, and this proceeding involves disputed issues of fact.

16. Respondent has the initial burden of proof. Respondent must make a prima facie showing of the factual and legal sufficiency of the assessment. § 120.80(14)(b)2., Fla. Stat. (1996). The burden of proof then shifts to Petitioner to show that it does not owe any amount or owes less than the amount assessed.

17. Respondent satisfied its burden of proof. During the audit period that began in May 1995, Petitioner was registered

as a "dealer" for the purpose of the state sales tax.

Petitioner offered for sale or sold tangible personal property at retail. § 212.06(2)(c), Fla. Stat. (1994). For each month of the audit period, Petitioner filed a sales tax return on form DR-15 pursuant to Section 212.11, Florida Statutes (1994).

18. For 1997, 1998, and 1999, Petitioner reported fewer gross sales for the purpose of the state sales tax than Petitioner reported for the purpose of the federal income tax. During the same period, Petitioner provided decorator and design services in transactions involving the sale of tangible personal property, but did not report the sale of those services for the purpose of the state sales tax in violation of Florida Administrative Code Rule 12A-1.001(17)(c)1.

19. The excess of the gross sales Petitioner reported on its federal tax returns for 1997, 1998, and 1999, over the gross sales Petitioner reported to the state on the DR-15 forms for the same period, represented unreported sales for the purpose of the state sales tax (unreported sales). The product derived by multiplying the applicable percentage by the value of services provided in transactions involving the sale of tangible personal property during the same three years represented under-reported sales for the purpose of the state sales tax (under-reported sales). Petitioner submitted no evidence to show that the

amount of unreported sales included part or all of the amount of under-reported sales.

20. Charges for services during 1997, 1998, and 1999, that involve sales of tangible personal property as inconsequential elements for which no separate charges are made are exempt from the sales tax. § 212.08(7)(v), Fla. Stat. (1996). Exemptions to 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, 530-531 (Fla. 1973).

21. Petitioner was responsible for maintaining records of its gross sales, including invoices and other documents required to support its sales tax reporting position in 1997, 1998, and 1999. §§ 212.13(2) and 213.35, Fla. Stat. (1996). Petitioner introduced no evidence to support a finding that Petitioner does not owe the amount assessed or owes less than the amount assessed.

22. During the audit period, Petitioner was a dealer that failed to collect and remit the tax due on retail sales and is liable for the tax, penalty, and interest. Petitioner owes the amount assessed. § 212.07(3), Fla. Stat. (1996).

RECOMMENDATION

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

RECOMMENDED that Respondent enter a final order assessing Petitioner for \$148,019.89 in tax, penalty, and interest, plus the amount of interest that accrues from August 15, 2001, through the date of payment.

DONE AND ENTERED this 4th day of February, 2005, in Tallahassee, Leon County, Florida.



DANIEL MANRY
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of February, 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.