

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

C AND C MECHANICAL CONTRACTORS, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 06-3958  
 )  
DEPARTMENT OF REVENUE, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER OF DISMISSAL

Because this case may be determined upon the pleadings and papers filed, no final disputed-fact hearing has been held.

STATEMENT OF THE ISSUE

Whether this cause should be dismissed for Petitioner's failure to comply with Section 120.80(14)(b)3., Florida Statutes.

PRELIMINARY STATEMENT

This cause was referred to the Division of Administrative Hearings on or about October 12, 2006.

On October 26, 2006, a Notice of final disputed-fact hearing and an Order of Pre-hearing Instructions were entered.

On November 13, 2006, Respondent Agency filed its Motion to Dismiss. Petitioner filed no timely response in opposition as permitted by Florida Administrative Code Rule 28-106.204. On November 28, 2006, Respondent filed an affidavit of Martha

Watkins in support of its Motion to Dismiss. In an abundance of caution, oral argument was heard by telephonic conference call on November 29, 2006. By an Order entered December 6, 2006, the final disputed-fact hearing was cancelled; the Motion to Dismiss was taken under advisement; and each party was permitted to file a memorandum of law, on or before, January 11, 2007.

Respondent timely filed its Memorandum of Law, together with a Second Affidavit of Martha Watkins. Petitioner filed its Memorandum of Law late. On January 16, 2007, Respondent filed a Motion to Strike Respondent's late Memorandum. On January 17, 2007, Petitioner filed a Response to Respondent's Motion to Strike. On January 18, 2007, Respondent filed a Reply to Petitioner's Response, a pleading not authorized by any rule.

Once again, in an abundance of caution, all filings have been considered.

#### FINDINGS OF FACT

1. Petitioner is contesting an assessment of taxes, pursuant to an audit conducted by Respondent Department of Revenue. The total amount of the assessment was \$32,312.24.

2. Following the audit, in a letter to the Department's auditor dated April 17, 2006, Petitioner's counsel stated that taxes "in the amount of \$5,744.80 is something [Petitioner] would be obligated to pay under the laws of the State of Florida, and as such, they are willing to do so. They would be

willing to pay interest due on this money."<sup>1/</sup> This statement constitutes a clear admission that Petitioner owes the stated amount of the tax, \$5,744.80, plus interest that accrues daily.

3. Petitioner's Memorandum makes the un-sworn statement that:

At the time the parties met to discuss the assessment with the representative of the Department of Revenue, Martha Watkins, they offered to pay \$5,744.80 of the taxes but were informed it was part of the \$32,312.24, and they could either pay it all or contest it.

At all times material hereto the petitioners have stood ready to pay the \$5,744.80. On April 17, 2006, we wrote a letter to Martha Watkins making this offer for the second time. On August 17, 2006, we again wrote to the Department of Revenue attaching our letter of April 17, 2006, again making this offer. At no time was a response received to either letter.

4. The August 17, 2006, letter alluded to in Petitioner's Memorandum is not of record and neither a copy of that letter, nor an affidavit of its contents, has been submitted by either party.

5. At no time has Petitioner asserted that any amount of tax money was unequivocally tendered to Respondent. No affidavit to that effect has been filed in this case.

6. The Second Affidavit of Martha Watkins, submitted with the Department of Revenue's timely Memorandum states, in pertinent part:

4. I conducted the audit of C AND C MECHANICAL CONTRACTORS, INC., from which arose the challenged assessment and this controversy.

5. During the course of the audit, and subsequent communication with C AND C MECHANICAL CONTRACTORS, INC., regarding the audit and assessment of taxes and interest, C AND C MECHANICAL CONTRACTORS, INC., made at least one settlement offer, that was unacceptable, and was rejected by the Department as such. At no time did C AND C MECHANICAL CONTRACTORS, INC., unequivocally tender to me, or unequivocally offer to tender to me, the uncontested tax and applicable interest, and at no time did I refuse to accept any payment of taxes.

7. On September 21, 2006, a Request for Administrative Hearing was filed with the Department of Revenue.

8. On September 28, 2006, the Executive Director of the Department of Revenue entered an Order Dismissing the Petition with Leave to Amend. That Order reads, in pertinent part:

On September 21, 2006, the Florida Department of Revenue received a "Request for Administrative Hearing" from Petitioner, C & C Mechanical Contractors. While the document clearly is a request for hearing, the petition does not state what the Petitioner is disputing. A record search shows that at least one Notice of Proposed Assessment was issued by the Department on June 15, 2006 to this Petitioner. It is impossible to determine from the petition whether this proposed assessment is being challenged. However, because this request was sent within the applicable time frame to dispute the Notice of Proposed Assessment, the Department will treat it as such.

As required by law, the notice stated that a formal protest for an administrative hearing had to be received in the Office of the General Counsel within sixty days after the assessment became final and had to be in compliance with chapter 120, Florida Statutes. The petition fails to meet the requirements contained in chapter 120, Florida Statutes and Uniform Rule 28-106.201, Florida Administrative Code, the appropriate rule for use in filing a petition requesting a hearing involving disputed issues of material fact. A copy of the appropriate rule is provided with this order.

Specifically, the petition does not contain: (1) a statement of when and how the Petitioner received notice of the agency decision; (2) all disputed issues of material fact. If there are none, the petition must so indicate; (3) a concise statement of the ultimate facts alleged, including the specific facts the Petitioner contends warrant reversal or modification of the agency's proposed action; (4) a statement of the specific rules or statutes the Petitioner contends require reversal or modification of the agency's proposed action, and (5) a statement of the relief sought by the Petitioner, stating precisely the action the petitioner wishes the agency to take with respect to the agency's proposed action.

Because of these deficiencies, Petitioner's documentation must be dismissed.

IT IS ORDERED:

The petition for hearing filed by Petitioner is DISMISSED. Such dismissal is without prejudice to Petitioner to amend the petition to provide the information listed above. . . .

9. On October 11, 2006, the Amended Petition for Administrative Hearing was filed with the Department of Revenue.

That Amended Petition stated, in pertinent part:

1. The Petitioner received a certified letter dated June 15, 2006, stating taxes were due and owing in the amount of \$32,312.24. This amount included \$5,774.80 in fabrication cost taxes which the Petitioner does not object too [sic]. The balance of the \$32,312.24 was for taxes on items sold to non-taxable entities. The Petitioner would object to these taxes and gives as grounds the following:

a) Items sold to non-taxable entities are not subject to the Florida Tax Code.

b) The department made a determination the items sold to the non-taxable entities were taxable stating the contractor, in this case the Petitioner, was the end user.

c) Florida Tax Code states in part ". . . a determination whether a particular transaction is properly characterized as an exempt sale to a government entity or a taxable sale to a contractor shall be based on the substance of the transaction rather than the form in which the transaction is cast." The department "shall adopt rules that give special consideration to factors that govern the status of the tangible personal property before its affixation to real property."

d) The Department of Revenue has adopted a rule which is in violation of the incident [sic] of legislature and contrary to Florida Statute 212.08.<sup>2/</sup> (Emphasis supplied).

10. The Amended Petition constitutes a clear admission that the \$5,744.80 portion of the taxes due under the audit were both uncontested and owed, as of October 11, 2006.

11. The first Affidavit of Martha Watkins, filed November 28, 2006, in support of the pending Motion to Dismiss, states, in pertinent part:

1. I am a [sic] sui juris and otherwise competent to testify in this matter.
2. I am employed by the Florida Department of Revenue in the position of Tax Auditor III.
3. I am familiar with the accounts, accounting methods, and maintenance of records at the Florida Department of Revenue for sales tax, interest, and penalties.
4. I am authorized by the Department of Revenue to make affidavit regarding the payment status of sales taxes, interest and penalties relative to registered Florida dealers.
5. I have reviewed, and have personal knowledge of the accounts of the Florida Department of Revenue regarding tax payment of C&C MECHANICAL CONTRACTORS, INC., a Florida corporation that has in the past been issued a Certificate of Registration by the Department of Revenue.
6. According to the records of the Department of Revenue, as of November 27, 2006, C&C MECHANICAL CONTRACTORS, INC., has not paid any sums to the Department of Revenue against the assessed outstanding balance of sales tax, interest or penalties, since prior to April 16, 2006.

CONCLUSIONS OF LAW

12. The question of jurisdiction may be resolved in response to the Motion to Dismiss upon the foregoing facts.

13. Section 120.80(14)(b)3., Florida Statutes, reads, in pertinent part:

(14) DEPARTMENT OF REVENUE.--

\* \* \*

(b) Taxpayer contest proceedings.--

\* \* \*

3.a. Prior to filing a petition under this chapter, the taxpayer shall pay to the applicable department the amount of taxes, penalties, and accrued interest assessed by that department which are not being contested by the taxpayer. Failure to pay the uncontested amount shall result in the dismissal of the action and imposition of an additional penalty of 25 percent of the amount taxed.

b. The requirements of s. 72.011(2) and (3)(a) are jurisdictional for any action under this chapter to contest an assessment or denial of refund by the Department of Revenue, the Department of Highway Safety and Motor Vehicles, or the Department of Business and Professional Regulation. (Emphasis supplied.)

14. Section 72.011(1)(a), Florida Statutes, specifically addresses both circuit court and Chapter 120 actions.<sup>3/</sup> Section 72.011(2) and (3)(a) addresses the time frame within which actions may be brought and how the uncontested tax and other



monies are to be handled if they are paid into the circuit court action.

15. Petitioner claims an estoppel, but has failed to prove the necessary elements of an estoppel. Conditional offers to pay do not equate with the tender of a check for the uncontested partial amount.

16. Petitioner asserts that Respondent's failure to respond to Petitioner's settlement offers led Petitioner to believe its only course of action was the filing of a Section 120.57(1) petition, but this is fallacious reasoning. Silence by a statutory taxing authority existing for the sole ultimate purpose of collecting taxes cannot reasonably be equated with a refusal to accept an offered partial payment. There was no affirmative representation by the Agency, and thus no estoppel lies against the Agency. If the audit/assessment was not to become final, in whole or in part, a legally sufficient petition was necessary, but that necessity does not change the clear language of the statute, which makes payment of the uncontested tax amount prerequisite to the filing of such a petition.

17. While Petitioner did offer to compromise the \$32,312.24 by the payment of a fraction of that amount, there is no evidence Petitioner attempted to actually pay the uncontested portion of the assessment without qualification or condition attached. In the absence of such unequivocal tender of payment,

this forum is required by law to dismiss the case as without jurisdiction.

RECOMMENDATION

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

RECOMMENDED that the Florida Department of Revenue enter a final order dismissing the Amended Petition.

DONE AND ENTERED this 27th day of February, 2007, in Tallahassee, Leon County, Florida.



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ELLA JANE P. DAVIS  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 27th day of February, 2007.

ENDNOTES

1/ In compliance with Section 90.408, Florida Statutes, proposed settlement terms were redacted from this letter when it was attached to Respondent's Motion to Dismiss.

2/ Due to the recommendation of this instant Recommended Order it is not necessary to address lack of jurisdiction of this issue either due to Petitioner's failure to file a rule

challenge directly with the Division or with regard to Section 120.57(1)(e), within this cause.

3/ Section 72.011(3)(b)2, Florida Statutes provides, in pertinent part, that "if . . . it is determined . . . that a plaintiff, due to a good faith de minimis error failed to comply [with the requirement that any uncontested tax be paid], the plaintiff shall be given a reasonable time within which to comply before the action is dismissed." The statute goes on, however, to define a de minimis error as limited to one that involves an amount of unpaid and uncontested tax that is equal to or less than five percent of the assessment, and goes further to specifically exclude from consideration for a waiver from dismissal any case wherein an uncontested tax that exceeds five per cent of the assessment is not paid. The statute discusses oversight or excusable error, but not compromise.

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.