STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MCCLELLAN TRUCKING COMPANY,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 08-3893F
	)	
DEPARTMENT OF REVENUE,	)	
	)	
Respondent.	)	
	)	

FINAL ORDER

On January 29-30, 2009, a duly-noticed hearing was held in Tallahassee, Florida, before Administrative Law Judge Lisa Shearer Nelson of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Bradford L. Stewart, Esquire
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For Respondent: Jeffrey M. Dikman, Esquire
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STATEMENT OF THE ISSUES

The issues to be determined in this proceeding are whether Petitioner is entitled to attorney's fees and costs pursuant to Section 57.111, Florida Statutes, and if so, in what amount?

PRELIMINARY STATEMENT

On July 29, 2008, Petitioner McClellan Trucking Company served a Petition for Attorney's Fees and Costs Under 57.111,

Florida Statutes. While the caption of the petition indicates that it was filed with the Division of Administrative Hearings, it was apparently filed with the Department of Revenue (Respondent or DOR), which on August 11, 2008, forwarded it to the Division for assignment of an administrative law judge.

The case was assigned to the undersigned and scheduled for hearing to be held December 16, 2008. At the request of the Respondent, the hearing was continued and rescheduled for January 27, 2009. Thereafter, an additional day of hearing was scheduled at Respondent's request. The discovery and motion practice was substantial, and reference to the docket and the Transcript in this case recounts the course of discovery, the motions filed and the rulings thereon.

At hearing, Petitioner presented the testimony of Hugh Adrian McClellan, and Petitioner's Exhibit 1 was admitted. Respondent presented the testimony of Mathew Crockett, Fred Miller and Ronald Palmer. Respondent's Exhibits 1-53, 56-58, and 73-80 were admitted into evidence without objection.

The three-volume Transcript was filed with the Division on February 16, 2009. At the request of the parties, proposed recommended orders were to be filed by March 30, 2009. Respondent's Proposed Recommended Order was filed March 30, 2009: Petitioner's was filed March 31, 2009. Both submissions have been carefully considered in the preparation of this Final Order.

All references to Florida Statutes are to the codification in effect during the audit period, unless otherwise specified.

FINDINGS OF FACT

1. Petitioner, McClellan Trucking Company, is a Florida corporation organized for profit. It is a family-owned trucking company located in Clermont, Florida, and constitutes a "small business party" within the meaning of Section 57.111, Florida Statutes (2008).

2. On December 19, 2006, McClellan Trucking Company was notified that its account had been selected by DOR for a tax compliance audit with respect to payment of sales and use tax for the audit period beginning November 1, 2003 through October 31, 2006.

3. The Notice of Intent to Audit Books and Records attached a copy of the Florida Taxpayers Bill of Rights, along with a Sales and Use Tax Information Checklist identifying the type of records required to be available during the audit. The Notice also included the following statement:

> VALID RESALE AND CONSUMER CERTIFICATES OF EXEMPTION (SALES TAX) Only valid certificates will be accepted during the audit process as proper documentation for exempt transactions. The Florida Courts have ruled that sales tax is a vendor's tax; therefore, if a valid certificate is not on file, the vendor is liable for the tax regardless to whom the sale is made or for what purpose.

4. During the audit period, Petitioner purchased motor vehicles and parts for motor vehicles without paying any sales

taxes at the time of purchase. This was accomplished by Petitioner's delivery of "resale certificates" to the selling dealer.

5. Petitioner sought to self-accrue and remit use taxes on a pro-rated portion of the purchase price of the vehicles, pursuant to the partial exemption contained in Section 212.08(9)(b), Florida Statutes.

6. The pro-rated exemption is a separate and distinct exemption from the sale for resale exemption. Under the pro-rated exemption, DOR allows licensed interstate common carriers who comply with the requirements of Florida Administrative Code Rule 12A-1.064 to pro-rate and pay tax on a portion of the purchase price of vehicles and related parts, with the tax being based upon the percentage of total mileage driven that is within Florida.

7. For the time period covered by the audit, Petitioner McClellan Trucking Company was not registered as a dealer, although Mr. McClellan was registered individually. In addition, Petitioner did not have a license as a common carrier from the United States Department of Transportation, and did not have a direct pay permit from DOR.

8. Once notified, Petitioner took steps to correct each of these deficiencies. On December 26, 2006, Petitioner became registered as a dealer, and on December 31, 2006, Mr. McClellan canceled the sole proprietorship registration. In January of

2007, Petitioner applied for a direct pay permit with DOR, which was granted May 3, 2007. Finally, Petitioner applied for and received a common carrier license from the United States Department of Transportation.

9. Although these steps would serve to support the partial exemption from taxes for future purchases, because neither the direct pay permit or the common carrier license was in effect at the time of the purchases covered by the audit, any such purchases occurring during the audit period were determined not to be exempt.

10. A Notice of Intent to Make Audit Changes (NOI) was presented to Mr. McClellan on May 3, 2007, indicating that sales and use taxes (with penalties and interest) were due in the amount of $139,841.32.

11. The NOI includes the following notifications:

> If you do not agree or if you have questions about these audit adjustments:
>
> - Do not sign this notice. Instead, request an audit conference to review the factual circumstances and reasons for the adjustments.
> - You have until 06/04/2007 to request a conference.
> - If you need an extension, submit a written request before the date referenced in the previous line.
>
> Your Rights.
>
> - Information about Taxpayers Rights is enclosed explaining your options regarding the audit adjustments. Review your rights carefully.

- Take advantage of your right to an audit conference to discuss adjustments, if you have questions or disagree.

- Your right to an audit conference expires if we do not hear from you within 30 days of our issuing you this notice. We will then issue a Notice of Proposed Assessment for the audit, based on the adjustments outlined in this notice.

- After the Notice of Proposed Assessment has been issued, you have the right to review the audit findings through formal and informal protest procedures.

12. Petitioner did not sign the NOI, but instead retained counsel who, on May 15, 2007, requested an audit conference. The audit conference was scheduled for and took place on June 7, 2007. At that time, Mr. McClellan argued that the Department should have notified him that his direct pay permit had expired, and disagreed with the rule requirement that it have a common carrier permit with the federal D.O.T. The audit assessment was upheld.

13. Although Petitioner argued that Florida Administrative Code Rule 12A-1.064 was in conflict with Section 212.08(9)(b), Florida Statutes, Petitioner did not file a Petition pursuant to Section 120.56, Florida Statutes, seeking to invalidate the rule.

14. Petitioner was notified by letter dated June 22, 2007, that penalties related to the assessment were waived, and that the audit file was being forwarded to the Tallahassee office, which would issue a Notice of Proposed Assessment. Petitioner received a new Notice of Intent to Make Audit Changes dated

July 5, 2007, which indicated a total due of $141,521.29. This Notice continued to list penalties as part of the total.

15. On July 10, 2007, Petitioner's counsel wrote to Fred Miller, the tax auditor, and questioned the failure to fully waive the penalty.

16. On August 17, 2007, DOR issued a Notice of Proposed Assessment (NOPA). The NOPA waived all penalties and listed a balance due of $119,388.25. The NOPA also contained the following language:

> If you do not agree with the proposed assessment set forth in this notice, you may seek a review of the assessment through one of the following: (a) an informal written protest; (b) an administrative hearing; or (c) a judicial proceeding. Procedures for these various types of actions are set forth in the enclosed brochure.
>
> If you elect to file an informal written protest, your protest must be filed with the Department no later than 10/16/2007, unless you request and receive an extension prior to this date. If an informal written protest is not timely filed, the proposed assessment will become a FINAL ASSESSMENT on 10/16/2007.
>
> If you choose to request either an administrative hearing or judicial proceeding, your request must be filed no later than 12/17/2007 or 60 days from the date the assessment becomes a Final Assessment. This time limit is mandated by statute and cannot be waived by the Department. The petition for an administrative hearing must be filed with the Department. For judicial proceedings, a complaint must be filed with the appropriate Clerk of the Court.

17. On September 20, 2007, Petitioner filed a Written Protest. The protest contained the following arguments: 1) that confusion over Petitioner's status as a common carrier was caused by Adrian McClellan's registration as a sole proprietor as opposed to Petitioner's registration as a corporation; and 2) that this technical error resulted in Petitioner's loss of common carrier status that would permit the partial exemption based on Petitioner's common carrier status.

18. The Written Protest was forwarded to the Department's Technical Assistance and Dispute Resolution Section. On January 16, 2008, counsel for Petitioner forwarded to Matt Crockett, an employee in the Technical Assistance and Dispute Resolution Section, additional documentation, including copies of leases showing that McClellan leased a fleet of approximately 30 trucks to Watkins Motor Lines, now FedEx. However, Petitioner continued to argue for the pro-rated exemption based upon common carrier status.

19. On January 29, 2008, DOR issued a Notice of Decision (NOD) upholding its original assessment. The NOD discusses whether Petitioner is liable for Florida sales tax on purchase transactions in which the taxpayer pro-rated the tax due on tangible personal property purchased for use in interstate commerce, and determines that Petitioner is not entitled to the exemption. The NOD contains the following notice of taxpayer appeal rights:

> This Notice of Decision constitutes the final decision of the Department unless a Petition for Reconsideration is filed on a timely basis, in which event the Notice of Reconsideration will be the Department's final decision. The requirements for a Petition for Reconsideration are set forth below.
>
> * * *
>
> Absent a timely-filed Petition for Reconsideration, the assessment reflected in the Notice of Decision is final and you have three alternatives for further review:
>
> 1) Pursuant to Section 72.011, F.S., and Rule Chapter 12-6, F.A.C., you may contest the assessment in circuit court by filing a complaint with the clerk of the court.
> . . . .
> 2) Pursuant to Sections 72.011, 120.569, 120.57, and 120.80(14), F.S., and Rule Chapter 12-6, F.A.C., you may contest the assessment in an administrative forum by filing a petition for a Chapter 120 administrative hearing with the Department of Revenue . . . .
> 3) Pursuant to Section 120.68, F.S., you may contest the assessment in the appropriate district court of appeal . . . .

20. On February 28, 2008, Petitioner submitted a Petition for Reconsideration. The Petition for Reconsideration continued to advocate for the partial exemption based upon Petitioner's asserted common carrier status. The Petition for Reconsideration referenced Petitioner's leases to FedEx, which is a licensed common carrier. On April 9, 2008, Petitioner provided a Supplement to its Petition for Reconsideration. This supplement contained the following arguments: 1) Petitioner was not required to be registered with the Federal Motor Carrier Safety

Administration (FMCSA) during the audit period because the Petitioner leased the motor vehicles to a common carrier registered with FMCSA, and therefore, the vehicles were operated by a common carrier; and 2) Petitioner has complied with Florida Administrative Code 12A-1.064 except for the requirement that it have direct pay authority, which it should be excused for based upon misleading information received from the Department.

21. On May 21, 2008, DOR issued its Notice of Reconsideration (NOR). In the NOR, the Department determined that no assessment was due. The NOR states in pertinent part:

> Taxpayer presents a new argument upon reconsideration. Taxpayer argues that it purchased motor vehicles exclusively for leasing purposes during the audit period and then leased these vehicles to Watkins Motor Lines (Watkins). Accordingly, Taxpayer believes that the vehicles were exempt from Florida Sales Tax at the time of purchase. Taxpayer has offered to supply affidavits from Watkins' employees supporting Taxpayer's claims.
>
> * * *
>
> Based on the history and current wording of the statutes, the proper interpretation of s. 212.08(9)(b), F.S., is that it is intended to reach motor vehicles owned or leased by operators that are common carriers. Due to the retention of the common carrier requirement, many owner operators may not qualify for taxation under the proration statute, because they are contract carriers rather than common carriers. There is a misconception that owner operators that contract with a common carrier are entitled to the benefits of the proration statute due to the common carrier status of the other party to the contract. That is not the case.

The Legislature opened the door for contract carriers to qualify after the ICC was abolished and then reinstated the common carrier requirement during the next legislative session, which indicates clear intent not to extend the exemption to those who operate as contract carriers (even if they contract exclusively or primarily with common carriers).

In order to determine whether a particular owner operator is eligible for the partial exemption, it is necessary to define the terms "common carrier" and "contract carrier." In Ruke Transport Line, Inc. v. Green, 156 So. 2d 176 (Fla. 1st DCA 1963), the court noted that a common carrier must offer his services to the public generally and on the same terms for all. A common carrier is "bound to serve all who apply and is liable for refusal, without sufficient reason to do so." A contract carrier, on the other hand, engages in transport for hire but can choose whether or not to accept any particular engagement and the terms upon which to accept it.

During the audit period, Taxpayer provided transport services to one company, Watkins, on a contract basis. Taxpayer has failed to provide any evidence that it transported persons or property for pay to anyone at anytime as a common carrier. Moreover, Taxpayer has failed to provide evidence that it maintained a regularly scheduled service for the general public while it was under contract with Watkins. As a result, the Department determined in Taxpayer's Notice of Decision that Taxpayer's activities were those of a contract carrier.

Taxpayer now argues that it purchased its motor vehicles exclusively for leasing purposes and leased the vehicles to Watkins. Upon further consideration, of Taxpayer's new arguments and close inspection of Taxpayer's "Equipment Lease and Operating Contract," (the Agreement) with Watkins Motor Lines, Inc. (Watkins), the Department has determined

> that Taxpayer leased its motor vehicles to Watkins.
>
> * * *
>
> The collective terms of the Agreement reveal Taxpayer's intent to lease its vehicles to Watkins. Rule 12A-1.072(2)(a), F.A.C., states that tangible personal property purchased exclusively for leasing purposes by a dealer registered with the Department at the time of purchase may be purchased tax-exempt. The purchasing dealer is required to issue a copy of the dealer's Annual Resale Certificate to the selling dealer at the time of the purchase in lieu of paying tax, as provided in Rule 12A-1.039, F.A.C. It is clear that Taxpayer's vehicles, purchased exclusively for leasing to common carriers, were not taxable at the time of sale, because Taxpayer tendered a copy of its resale certificate to its dealers. . . .
>
> After purchasing motor vehicles and parts in Florida, Taxpayer erroneously remitted sales tax to the Department at an apportioned rate during the audit period. Consequently, Taxpayer is eligible for a refund of tax paid in error to the Department. . . .
>
> Since Taxpayer leases motor vehicles to common carriers, Taxpayer must collect Florida Sales Tax on the lease payments received from its customers. . . . .

22. Neither party sought review or further hearing on the Notice of Reconsideration. Therefore, the decision became final.

23. No administrative complaint pursuant to Chapter 120, Florida Statutes, was ever filed against Petitioner.

24. No complaint in circuit court was ever filed by the Department against Petitioner.

25. No final order was ever filed with the agency clerk.

26. No notice of voluntary dismissal was ever filed.

27. There was a settlement of all issues that resulted in the elimination of the amount of tax due.

28. Throughout the process, Petitioner advocated for the application of the pro-rated tax exemption for common carriers. It did not assert an entitlement to the sale for resale or lease exemption.

29. Petitioner served a Petition for Attorney's Fees and Costs pursuant to Section 57.111, Florida Statutes, on July 29, 2008. The Petition was filed with the Department of Revenue, as opposed to the Division, on August 4, 2008.

30. Petitioner was a small business party within the meaning of Section 57.111, Florida Statutes, during the audit period.

31. Petitioner is seeking reimbursement of $15,969.00 in attorney's fees and $1,765.00 in costs.

32. The parties have stipulated that the amount of attorney's fees and costs sought is reasonable.

CONCLUSIONS OF LAW

33. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with Sections 120.569 and 120.57(1), Florida Statutes (2008).

34. In this case, Petitioner seeks an award of attorney's fees and costs pursuant to Section 57.111, Florida Statutes (2008), the Florida Equal Access to Justice Act (FEAJA). Section

57.111 was enacted in order to "diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in certain situations an award of attorney's fees and costs against the state." § 57.111(2), Fla. Stat. (2008). To meet this goal, Section 57.111(4)(a) provides:

> (4)(a) Unless otherwise provided by law, an award of attorney's fees and costs shall be made to a prevailing small business party in any adjudicatory proceeding or administrative proceeding pursuant to chapter 120 initiated by a state agency, unless the actions of the agency were substantially justified or special circumstances exist which would make the award unjust.

35. The burden of proof in these proceedings is a shifting one. The general rule is that the party asserting the affirmative of an issue bears the burden as to that issue. Florida Department of Transportation v. J.W.C. Company, 396 So. 2d 778 (Fla. 1st DCA 1981). In cases under the FEAJA, the party seeking the award of fees is required to show that it is a small business, as defined by Section 57.111; the prevailing party; and that the underlying adjudicatory process was initiated by the state agency. Once this threshold is met, the agency must show that its action in initiating the agency proceeding was "substantially justified." Helmy v. Department of Business and Professional Regulation, 707 So. 2d 366, 368 (Fla. 1st DCA 1998); Gentele v. Department of Professional Regulation, 513 So. 2d 672 (Fla. 1st DCA 1987); Pinellas Rebos Club, Inc. v. Department of Revenue, DOAH Case No. 96-3150F, 97 ER FALR 1009 (DOAH 1997);

Lauren, Inc. v. Department of Revenue, Case No. 93-0256F, 94 TAX FALR 430 (DOAH 1993).

36. Respondent has asserted that Section 213.21, Florida Statutes, prohibits any award of attorney's fees and costs pursuant to Section 57.111, Florida Statutes, because Section 213.21(1)(3) provides that the taxpayer has the right to be represented during informal conferences "at the taxpayer's cost." The statute does not expressly say that a taxpayer is prohibited from seeking reimbursement of those costs through an award under Section 57.111. However, it is not necessary to reach this issue because, based upon the facts presented, Petitioner is not entitled to an award of attorney's fees and costs under the statute.

37. The parties have stipulated that Petitioner is a small business party within the meaning of Section 57.111(3)(d). Petitioner must also prove that it is a prevailing small business party as defined in Section 57.111(3)(c). To do so, Petitioner must demonstrate one of the following:

> 1. That a final judgment or order has been entered in favor of the small business party and such judgment or order has not been reversed on appeal or the time for seeking judicial review of the judgment or order has expired;
>
> 2. A settlement has been obtained by the small business party which is favorable to the small business party on the majority of issues which such party raised during the course of the proceeding;

3. The state agency has sought a voluntary dismissal of its complaint.

38. The Notice of Reconsideration was not a final judgment or order. As noted in the findings of fact, no order was docketed with the Agency Clerk, as required in the definition of a final order in Section 120.52(7), Florida Statutes. More importantly, Section 120.80(14), Florida Statutes (2007), specifically exempts assessments from the definition of a final order.

39. DOR never sought voluntary dismissal of a complaint, because no complaint, as such, was ever filed.

40. However, there was a settlement obtained by Petitioner which is favorable on the majority of issues it raised during the course of the proceeding. DOR maintains that there is no dispute but that no settlement was ever reached. A careful review of the Transcript of the hearing, however, shows that DOR concerned itself with whether there was a settlement agreement document signed between the parties to compromise the proposed assessment. While such agreements are permissible under Section 213.21, Florida Statutes, the language of Section 57.111(3)(c)2. does not require such a formalized process. It merely requires that the majority of the issues be decided in Petitioner's favor.

41. The more pivotal concern is whether settlement was reached in Petitioner's favor on the majority of issues raised by Petitioner. The answer to this question turns on whether one focuses on the overall goal of the Petitioner's actions; i.e., to

avoid the assessment; or the theory by which the assessment is avoided. Here, the theory Petitioner sought to use (the pro-rated exemption for common carriers) was unsuccessful and remains so. For the period of time affected by the audit, Petitioner was not entitled to the pro-rated exemption. However, the larger, and in truth more important, issue is whether Petitioner was liable for additional sales and use taxes for the audit period. On this point, Petitioner clearly prevailed, as the assessment went from nearly one hundred-twenty thousand dollars to zero. While the Department points to the language in the Notice of Reconsideration advising Petitioner that it must pay taxes on the leases, the Notice does not indicate any taxes are due and assessed. Petitioner is a prevailing small business party.

42. Finally, Petitioner must show that the state agency, DOR, has initiated agency action against it. The term "initiated by a state agency" has been defined in Section 57.111(3)(b):

> (b) The term "initiated by a state agency" means that the state agency:
>
> 1. Filed the first pleading in any state or federal court in this state:
>
> 2. Filed a request for an administrative hearing pursuant to chapter 120; or
>
> 3. Was required by law or rule to advise a small business party of a clear point of entry <u>after some recognizable event in the investigatory or other free-form proceeding of the agency</u>. (Emphasis supplied.)

43. Clearly, DOR did not file the first pleading in any state or federal court in this state, and did not file a request

for an administrative hearing pursuant to Chapter 120. However, DOR was required by law, and in fact, did advise Petitioner of a clear point of entry after some recognizable event in the investigatory or other free-form proceeding of the agency.

44. Section 120.569, Florida Statutes, provides in pertinent part:

> (1) The provisions of this section apply in all proceedings in which the substantial interests of a party are determined by an agency, unless the parties are proceeding under s. 120.573 or 120.574. . . . Each notice shall inform the recipient of any administrative hearing or judicial review that is available under this section, s. 120.57, or s. 120.68; shall indicate the procedure that must be followed to obtain the hearing or judicial review; and shall state the time limits that apply.

45. Sections 120.573 and 120.574 provide for mediation and summary hearings, which neither party has asserted were utilized in this case. Even assuming that informal conferences could be considered mediation, the procedure used does not comply with the requirements in Section 120.573 for a mediation agreement.

46. Consistent with Section 120.569(1), Florida Administrative Code Rule 28-106.111(1) provides that "[t]he notice of agency decision shall contain the information required by Section 120.569(1), F.S." (Emphasis supplied) While Section 120.57(5), Florida Statutes, provides that "[t]his section does not apply to agency investigations preliminary to agency action," Section 120.569 contains no such restriction on its scope.

47. While DOR stresses that the informal conference process is, by rule, a part of the investigative process, Florida Administrative Code Rule 12-6.003(5), Section 57.111(3)(b)3. contemplates that notice of a clear point of entry would occur "after some recognizable event in the investigatory of other free-form proceeding of the agency." It focuses on a recognizable event in the investigative process, but does not necessarily require that the process be completed.

48. In this case, the agency notified Petitioner of its intended agency action when it sent its Notice of Proposed Decision. As referenced in finding of fact 16, Petitioner was advised of its rights to challenge the proposed assessment through the informal written protest; a Chapter 120 hearing; or a judicial proceeding. It provided the time deadlines for each type of challenge. Most importantly, if no challenge was filed, the assessment would become final.

49. In sum, Petitioner has demonstrated that it is a small business party; that it is a prevailing party by virtue of resolving the majority of issues in its favor; and that the DOR initiated agency action against it. The burden shifts to the Department to demonstrate that it was substantially justified at the time it initiated agency action, or that special circumstances exist that would make an award unjust.

50. According to Section 57.111(3)(e), a proceeding is substantially justified if it had a reasonable basis in law and

fact at the time it was initiated by the agency. In this case, the Department has met its burden to demonstrate substantial justification.

51. Section 212.05, Florida Statutes, provides that every person is exercising a taxable privilege when engaging in the business of selling tangible personal property at retail, including the rental or furnishing of any of the items or services taxable under Chapter 212, and that for the exercise of such privilege, a tax is levied on each taxable transaction or event. While taxing statutes are strictly construed against a taxing authority, exemptions are strictly construed against the taxpayer. Department of Revenue v. Anderson, 403 So. 2d 397, 399 (Fla. 1981); Pioneer Oil Co. v. Department of Revenue, 401 So. 2d 1319, 1321 (Fla. 1981)("Exemptions contained in taxing statutes are special favors granted by the legislature and should be strictly construed against the taxpayers.").

52. Petitioner sought an exemption to its tax obligation provided in Section 212.08(9), Florida Statutes. This exemption is implemented by means of Rule 12-1.064. During the audit period, Petitioner (whether considered to be Adrian McClellan d/b/a McClellan Trucking Co., as registered during that time, or McClellan Trucking Co. as re-registered during the audit process) did not possess a direct pay permit or a license issued by the United States Department of Transportation.

53. While Petitioner argues that the rule requirement for federal licensure as common carrier exceeds the statutory authority for Rule 12-1.064, this argument is a red herring. First, Petitioner never filed a challenge to Rule 12-1.064. Second, whether or not licensure is required, as discussed at length in the NOR, Petitioner is a contract carrier as opposed to a common carrier, because it does not offer its services to the public generally and on the same terms for all. Finally, it is undisputed that Petitioner did not have a direct pay permit during the audit period, and obtaining the appropriate permits after the audit period did not render the prior sales exempt. Anderson, 403 So. 2d at 399 ("we do not find that the later registration and tender of certificates by some of the purchasers establishes their exempt status at the time of sale."). Petitioner simply did not meet the requirements to receive the pro-rated exemption for common carriers. The Department had a substantial basis in law and fact for determining that this exemption did not apply.

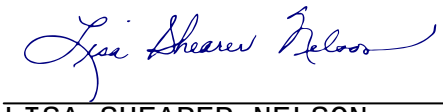
54. Moreover, special circumstances exist that would make the award of attorney's fees and costs unjust in this case. It was the Department's staff, not Petitioner or its counsel, that determined that Petitioner was entitled to the sale for resale exemption that ultimately resulted in the elimination of the tax assessment. Petitioner insists that this does not matter,

because the Department "knew" from the beginning of the audit that it leased vehicles to Watkins Trucking/FedEx. However, as stated specifically in Florida Administrative Code Rule 12A-1.039(1)(a), "The exempt nature of the transaction must be established by the selling dealer." It is not the responsibility of the auditor assigned to determine every possible exemption to which a taxpayer may be entitled. It is the taxpayer's responsibility to assert the exemption and provide sufficient information to substantiate the applicability of the exemption. Pioneer Oil; DOR v. Anderson. To award Petitioner attorney's fees and costs because a Department employee recognized and gave Petitioner the benefit of an exemption that Petitioner never argued would be a windfall to which Petitioner is not entitled.

CONCLUSION

Based on the foregoing it is found that the Department of Revenue was substantially justified when it initiated agency action and that special circumstances also exist that would make an award of attorney's fees and costs unjust. Accordingly, Petitioner's Petition for Attorney's Fees is dismissed.

DONE AND ORDERED this 24th day of April, 2009, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of appeal with the Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.