STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

COLORCARS EXPERIENCED AUTOMOBILES, INC.,	)	
Petitioner,	)	
vs.	)	Case No. 09-2837
DEPARTMENT OF REVENUE,	)	
Respondent.	)	

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the final hearing of this case for the Division of Administrative Hearings (DOAH) on March 22, 2010. The ALJ conducted the hearing by video teleconference in Tallahassee and Sarasota, Florida.

APPEARANCES

For Petitioner: John T. Early, III
Qualified Representative
Colorcars Experienced Automobiles, Inc.
2311 Tamiami Trail
Nokomis, Florida 34275

For Respondent: Jeffrey M. Dikman, Esquire
Office of the Attorney General
The Capitol, Plaza 01
Tallahassee, Florida 32399

STATEMENT OF THE ISSUE

The issue is whether a Notice of Intent to Levy that Respondent issued pursuant to Section 213.67, Florida Statutes

(2008),[1] is improper because either the $62,482.96 in Petitioner's four bank accounts belongs to third parties or the doctrine of equitable estoppel prevents collection.

PRELIMINARY STATEMENT

This proceeding is the second of two cases involving the same parties. The two cases are more fully described in the Findings of Fact.

In this proceeding, Respondent has issued a Notice of Intent to Levy (the Notice) and has effectively frozen four of Petitioner's bank accounts pursuant to Section 213.67. Petitioner concedes that one of the four accounts, containing a balance of $4,050.19 at the time of the Notice, was properly subject to the Notice.[2]

The remaining three accounts are the disputed accounts in this proceeding. Petitioner makes two allegations in an attempt to defeat the Notice. First, Petitioner alleges that the three accounts contain funds belonging solely to third parties. Second, Petitioner raises an estoppel argument. The argument alleges that an employee of Respondent gave Petitioner assurances that no collection activity would take place while alleged settlement negotiations were ongoing.

At the final hearing, Petitioner presented the testimony of five witnesses and submitted 26 exhibits for admission into

evidence. Respondent called one witness, submitted 13 exhibits, and requested official recognition of another exhibit.

The identity of the witnesses and exhibits and the rulings regarding each are reported in the official record of the hearing and a partial Transcript of the hearing that Respondent filed with DOAH on April 5, 2010. Respondent timely filed its Proposed Recommended Order on April 15, 2010. Petitioner did not file a PRO.

FINDINGS OF FACT

1. Petitioner is engaged in the used car business in Florida. Petitioner's principal place of business is in Sarasota, Florida.

2. Petitioner's principal and qualified representative is Mr. John T. Early, III. Mr. Early is a licensed attorney in the State of Connecticut, but Mr. Early engages in the used car business rather than the practice of law.

3. Respondent is the state agency responsible for administering the sales and use tax in Florida. The instant proceeding is the second of two cases between Petitioner and Respondent.

4. The first case between the parties is identified in the record as Colorcars Experienced Automobiles, Inc. vs. Department of Revenue, DOAH Case No. 08-005442 (Colorcars 1). On June 15, 2005, Respondent issued a tax assessment against Petitioner for

$245,057.07. The assessment was for tax, penalty, and accrued interest as of the date of the assessment.

5. Colorcars 1 began when Petitioner requested an administrative hearing to contest the tax assessment, and Respondent referred the request to DOAH to conduct the hearing. Colorcars 1 became final and non-reviewable on February 13, 2009, when Petitioner voluntarily dismissed its challenge, "with prejudice."[3]

6. After Colorcars 1 became final agency action, Respondent recorded a tax warrant for $319,512.05, including penalties and additional accrued interest.[4] Petitioner admits it owes taxes, penalties, and interest in an amount that exceeds the funds in the bank accounts evidenced in this proceeding.

7. The procedure Respondent utilized to freeze the bank accounts of Petitioner was appropriate, including the decision not to provide Petitioner with prior notice of the collection process. On April 21, 2009, Respondent sent a letter to Liberty Savings Bank, in accordance with Subsection 213.67(1), directing the bank to freeze any accounts belonging to Petitioner.

8. On April, 28, 2009, Liberty Savings Bank responded that four accounts were frozen with an aggregate balance of $62,482.96. The four frozen account balances are identified below by account number and by the account title as they appear on the bank account statements:

(a) CKG Acct. #2844006582
(Named “Colorcars Experienced Automobiles Acquisition Account”) $53,114.37

(b) CKG Acct. #2844006604
(Named “Colorcars Experienced Automobiles Management Account”) $4,050.19

(c) CKG Acct. #2844006671
(Named “Colorcars Experienced Automobiles Client Funds”) $5,243.03

(d) CKG Account #2844006817
(Named “Colorcars Experienced Automobiles Merchant Account”) $75.37

9. On April 29, 2009, Respondent served Petitioner with the Notice pursuant to Section 213.67. Respondent did not notify Petitioner in advance of the account freeze because Respondent had a reasonable basis to believe prior notice would jeopardize Respondent's ability to collect the unpaid funds. The assessment had not been paid even though the assessment had already become final and non-reviewable. Respondent was legitimately concerned that the money could be withdrawn if advance notice were given. Apart from the particular facts and circumstances in this case, prior notice is inconsistent with Respondent's administrative policy.

10. Mr. Early made attempts to remove the freeze from the accounts. Mr. Early informed Mr. Michael David, Respondent’s collections agent: (a) that three of the frozen accounts in controversy were “trust accounts”; and (b) that the three accounts contained money that did not belong to Petitioner.

11. Mr. David consulted with his supervisor, Mr. Kenneth Sexton. The two agents did not consider Petitioner's allegations to be sufficiently documented. Respondent kept the collection freeze in effect.

12. The parties have since stipulated on the record that none of the four frozen accounts are "trust accounts." The account registration statements show that the accounts were opened as "For-Profit Business/Corporation" accounts rather than as "trust" or "fiduciary" accounts.[5]

13. Prior to commencement of the collection action, Mr. Early had discussed payment of the tax assessment in Colorcars 1. Mr. Early alleges that Mr. David promised not to proceed with collection action while settlement discussions were ongoing in Colorcars 1. Mr. David denies having made that statement. Mr. Sexton is without knowledge of any such statement or agreement.

14. The fact-finder finds the testimony of Mr. David and Mr. Sexton to be credible and persuasive. The testimony is supported by the notes of the meetings. Petitioner made no payments toward the obligation due in Colorcars 1, and the tax due was in jeopardy when Respondent began collection. Collection without prior notice to Petitioner was reasonably justified under the circumstances and is consistent with Respondent's administrative policy.

15. Petitioner stipulates in its signed response to the Second Requests for Admissions that the funds in the disputed accounts are “commingled” and that the commingling is “extensive.” Petitioner failed to provide a sufficient accounting. A preponderance of the evidence does not provide sufficient source records to enable Respondent's expert or the trier of fact to make a determination that discrete and identifiable client funds might remain within the extensively commingled accounts that are in dispute.

16. Petitioner has had ample time and discovery to satisfy its factual burden of proof in this case. In the February 5, 2010, Order granting Respondent’s motion to compel, as evidenced in the motion hearing Transcript, the ALJ ordered Petitioner to produce legible documents during a defined six-month period that included portions of two tax years (the six-month period). The Order granting the motion to compel was cobbled together in a lengthy hearing with the parties, as was the six-month period, and was intended to enable the trier of fact to identify discrete client funds in the three disputed accounts and to promote an amicable settlement of this case between the parties so as to avoid the need for a hearing. Petitioner has failed to provide legible documents or factually complete documents that promote either intended purpose of the motion hearing.[6]

17. Petitioner provided some evidence that client funds, from five of Petitioner's customers, were deposited at various times into extensively commingled accounts. However, a preponderance of the evidence does not show that identifiable funds belonging to those clients remain in the extensively commingled accounts.

18. The fact-finder finds the testimony of the Respondent's expert to be credible and persuasive. The funds have been so completely and extensively commingled, and the account records produced by Petitioner were so lacking, that no discrete funds can be identified.

19. Only a small percentage of the deposits shown on the bank statements for the six-month period are from sources that can be identified. For example, the "Acquisition Account," which contains most of the frozen funds in dispute, lists 152 deposits. However, only three deposits can be identified by source. The three identified deposits total $46,725. By contrast, the unidentified deposits total $1,625,634.06.

20. Petitioner's pattern of only identifying the source of a small percentage of the deposits is consistent for each account. Of the $37,711.56 deposited into the "Merchant Account" during the six-month period, not one of the deposits was from an identifiable source. Of the $166,294.27 deposited into the "Client Funds" Account during the six-month period,

only $38,146 was from identifiable sources. None of the funds contained in the frozen bank accounts can be separately identified by a preponderance of the evidence as belonging to any party other than Petitioner.

CONCLUSIONS OF LAW

21. Petitioner argues that Respondent is equitably estopped from any collection action against Petitioner. Equity is the exclusive province of the courts in Florida. Art. V, Fla. Const. Neither DOAH nor its ALJs constitute a court with equitable jurisdiction. See Florida Department of Revenue v. WHI Limited Partnership, d/b/a Wyndham Harbor Island Hotel, 754 So. 2d 205, 206 (Fla. 1st DCA 2000); Florida State University v. Hatton, 672 So. 2d 576, 579 (Fla. 1st DCA 1996).

22. The jurisdiction of DOAH with respect to Petitioner's equitable estoppel issue is limited to relevant findings of fact. §§ 120.569 and 120.57(1), Fla. Stat. (2009). For reasons stated in the Findings of Fact, a preponderance of the evidence does not show that Respondent represented it would refrain from collection activity under the facts and circumstances evidenced in the record.

23. DOAH has jurisdiction over the remaining subject matter in this proceeding, as well as the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2009). DOAH provided the parties with adequate notice of the final hearing.

24. Once the assessment of taxes against Petitioner became final, Respondent had authority under Section 213.67 to issue the Notice. The Notice operated as a freeze of the bank accounts at issue in this proceeding during the statutory 60-day period prescribed in Subsection 213.67(1), as extended by the pendency of this administrative proceeding.

25. Petitioner does not contest that Respondent has the legal authority to issue the Notice and concedes that one of the four accounts is uncontested. Rather, Petitioner maintains that three of the four bank accounts contain funds belonging solely to third parties.

26. The burden of proof is on Petitioner. Petitioner must show by a preponderance of the evidence that a deposit into a general account was made for a specific purpose or subject to special terms and conditions. Carl v. Republic Security Bank, 282 F. Supp. 2d 1358 (S.D. Fla. 2003); Southeast First National Bank of Miami v. Scutieri, 396 So. 2d 859 (Fla. 3d DCA 1981); Coyle v. Pan American Bank Of Miami, 377 So. 2d 213 (Fla. 3rd DCA 1979).

27. Under Florida law, an accounting is a factual determination for the fact-finder. William R. Smith v. American Motor Inns of Florida, 538 F.2d 1090 (5th Cir. 1976). When funds are commingled, the burden is on Petitioner, acting as the functional equivalent of a fiduciary for alleged third-party

beneficiaries, to adequately account for funds belonging to the beneficiaries. Cf. Rasmussen v. Central Florida Council Boy Scouts of America, Inc., 2009 Lexis 14272 (M.D. Fla. April 15, 2009)(involving fiduciary accounting); Technical Acoustics v. Enterprise National Bank, 672 So. 2d 596 (Fla. 1st DCA 1996)(involving contract accounting).

28. The records evidenced in the final hearing were insufficient to make an independent determination that a discrete portion of the funds belonged to a third party. Rather, a preponderance of the evidence showed that the funds were so extensively commingled, and Petitioner's record-keeping so poor, that any individual identity of the funds has been lost.

29. Petitioner has failed to meet its burden of proof. A preponderance of the evidence does not show that any portion of commingled funds remain identifiable in the account as belonging to a third party.

30. The authority of DOAH is limited to a recommendation that Respondent enter a final order finding that all of the funds in the three disputed accounts, as well as the funds in the fourth undisputed account, belong to Petitioner and that none of the funds belong to third parties. Therefore, the funds in all four accounts are properly subject to the Notice dated April 29, 2009.

31. DOAH cannot issue a writ of garnishment that would enable Respondent to garnish the funds on deposit in the four bank accounts. The Florida Constitution reserves to the courts the power to issue writs. Art. V, Fla. Const. DOAH is not a court. Wyndham Harbor, 754 So. 2d at 206; Hatton, 672 So. 2d at 579. DOAH is part of the executive branch of government rather than the judicial branch of government. If a member of the executive branch of the government were to exercise power reserved to the judicial branch, the result would violate the separation of powers act. Art. II, § 3, Fla. Const.

RECOMMENDED ORDER

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

Recommended that Respondent enter a final order finding that all of the funds in the four bank accounts in evidence in this proceeding belong to Petitioner and are subject to the Notice of Intent to Levy that Respondent issued on April 29, 2009, in accordance with Section 213.67.

DONE AND ENTERED this 29th day of April, 2010, in Tallahassee, Leon County, Florida.

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DANIEL MANRY
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of April, 2010.

ENDNOTES

[1/] References to subsections, sections, and chapters are to Florida Statutes (2008), unless otherwise stated.

[2/] The undisputed account is bank account number . It is labeled on all account statements as "Management Account." See Respondent's Exhibit 9.

[3/] Section 72.011 provides a 60-day jurisdictional time limit for challenging a tax assessment.

[4/] A separate tax warrant was also recorded in the amount of $12,869.28 for other unpaid taxes that are unrelated to the Assessment Challenge.

[5/] During the collection action, Mr. Early and Mr. David discussed settlement of the freeze without settling the underlying tax liabilities or warrants. Those settlement discussions came to an impasse, and the bank account freeze continued.

[6/] Petitioner produced deposit slips for approximately 13 of 335 deposits made during the six months covered in the Order compelling discovery. Petitioner produced approximately 716

canceled checks for the six-month period, but the copies of the checks were miniaturized, illegible copies.

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.