

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EPIC HOTEL, LLC,)	
)	
Petitioner,)	
)	
vs.)	Case No. 10-1679
)	
DEPARTMENT OF REVENUE,)	
)	
Respondent.)	
_____)	

RECOMMENDED ORDER

Administrative Law Judge John D. C. Newton, II, of the Division of Administrative Hearings (Division), conducted the final hearing in this cause on June 1, 2010, by video teleconference with sites in Miami and Tallahassee, Florida.

APPEARANCES

For Petitioner: Herbert Friesner, Esquire
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For Respondent: Carrol Y. Cherry, Esquire
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Revenue Litigation Bureau
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STATEMENT OF THE ISSUE

Is the taxpayer, Epic Hotel, LLC, entitled to a refund of \$10,000 of sales tax paid for building materials that were used for the rehabilitation of real property located in an enterprise

zone, on the basis that 20 percent of its permanent, full-time employees are residents of the Enterprise Zone?

PRELIMINARY STATEMENT

Florida offers a sales tax exemption, provided through a refund process, for sales taxes paid on building materials used to rehabilitate real property located in an "Enterprise Zone." This case is about a dispute over the amount of sales tax refund to which Epic Hotel, LLC (Epic) is entitled. The Department of Revenue (Department) denied Epic's refund claim for sales tax in the sum of \$10,000. Epic requested a formal hearing to contest the refund denial. The Department of Revenue approved \$5,000 of the refund claim based on information obtained during the course of the dispute. The sole remaining issue is whether Epic has sufficiently established that 20 percent of its permanent, full-time employees reside inside the Enterprise Zone entitling Epic to the tax exemption and an additional \$5,000 refund.

The parties did not submit a joint pre-hearing statement. The Department filed a unilateral pre-hearing statement. Epic did not file a pre-hearing statement.

At the hearing, Epic called no witnesses. It offered two exhibits into evidence. Both exhibits were admitted.

The Department of Revenue called two witnesses and admitted six exhibits into evidence. The witnesses were John Shettle,

Tax Auditor II for the Department, and Andrea Nicole Hunter, Tax Audit Supervisor.

Epic made a closing argument. The Department did not. The parties were given an opportunity to submit proposed recommended orders. The Department filed a Proposed Recommended Order. Epic filed a Waiver of Right to File a Proposed Recommended Order. Testimony, exhibits, and rulings are reported in the transcript of the formal hearing filed with the Division on June 18, 2010.

FINDINGS OF FACT

1. The Department is an agency of the State of Florida and is authorized to administer the tax laws of the State of Florida.

2. In 2008 Epic constructed and began operation of a hotel in a State of Florida Enterprise Zone in Miami-Dade County, Florida.

3. Epic sought a refund of sales tax paid on building materials for the construction of the hotel.

4. The sales tax paid on building materials used in the rehabilitation of real property located in an Enterprise Zone may be exempt up to \$10,000, upon a showing that the items have been used for the rehabilitation of real property located in an Enterprise Zone and that 20 percent or more of the taxpayer's fulltime, permanent employees reside in the Enterprise Zone.

5. On or about August 24, 2009, Epic filed an Application for Refund-Sales and Use Tax. It requested refund of \$10,000 in sales tax for building materials used to build the hotel.

6. It submitted a completed Department form DR-26S and other documents, including a completed Department form EZ-M.

7. The form EZ-M is the Department's "Application for Eligibility" for the Florida Enterprise Zone Program Building Materials Sales Tax Refund. The form included a completed Section I identifying permanent, full-time employees Epic represented reside in the Enterprise Zone. The form represented that 22 percent of Epic's full-time, permanent employees reside in the Enterprise Zone.

8. The Enterprise Zone Coordinator for the area signed the EZ-M certifying, "that I have examined the statements contained on this application certificate, and to the best of my knowledge and belief they are true, correct and complete." The record does not indicate whether the Enterprise Zone Coordinator is an employee of the Department.

9. John Shettle, Tax Auditor for the Department, audited Epic's refund application.

10. Mr. Shettle is responsible for auditing refund applications. His duties include verifying that refund applications are complete and accurate, and that the applicant has provided the documentation required by the refund statute.

11. The Department issued Epic a Notice of Intent to Make Refund Claim Changes, Form DR-1200R (for Refund Number R09246069). It proposed to deny the refund claim for \$10,000.

12. The Notice asked Epic to provide additional documentation aimed at establishing that Epic owned the property where the hotel was located and that the individuals identified in Section I to the form EZ-M were full-time, permanent employees of Epic. The requested documents included a copy of Epic's 940 Federal Unemployment Tax Return and a copy of Epic's W3 form.

13. Mr. Shettle conducted independent research on the employee issue. He used the State's unemployment tax records and the Department of Business and Professional Regulation's employee leasing company registration data. He was unable to locate any evidence that the employees listed in Schedule A were employed by Epic. Epic has not presented any.

14. Epic has a Hotel Operating Agreement with Kimpton Hotel & Restaurant Group, LLC. The Agreement provides for Kimpton to "supervise, direct, and control the management, operation, and promotion of the Epic hotel."

15. The employees identified as Epic employees on Section I of Epic's EZ-M form are employees of Kimpton who provide the contracted services at Epic. They are not direct employees of Epic or employees leased by Epic.

16. Epic relied upon the Final Order of the Department of Revenue in The Angler Resorts, LLC v. State of Florida, Department of Revenue, Case No. DOR-08-17-FOI (Fla. Dept. of Rev., March 16, 2008), in its dealings with the Department. In reliance upon that Final Order, Epic maintained that it was not required to provide anything more than the certified form EZ-M and a completed Department form DR-26S.

17. The Department denied Epic's refund application on the basis that Epic could not be verified as the owner, lessee, or lessor of the rehabilitated parcel, and that the individuals listed in Section I could not be confirmed as employees of Epic.

18. During the course of this dispute about entitlement to the refund, Epic established ownership of the property at the time of the application. The Department consequently issued Epic a refund of \$5,000.

19. The Department has adopted rules governing the manner and form of refund applications.

CONCLUSIONS OF LAW

20. The Division has jurisdiction over this matter.
§ 120.57, Fla. Stat. (2009).

21. Section 212.08(5)(g), Florida Statutes (2009), creates a sales tax exemption for building materials used in the rehabilitation of real property located in an enterprise zone. The refund may be up to \$10,000 if at least 20 percent of the

taxpayer's full-time, permanent employees reside in the Enterprise Zone. It is the statute that provides for the sales tax refund that Epic seeks. Section 212.08(5)(g) provides:

(g) Building materials used in the rehabilitation of real property located in an enterprise zone.

1. Building materials used in the rehabilitation of real property located in an enterprise zone are exempt from the tax imposed by this chapter upon an affirmative showing to the satisfaction of the department that the items have been used for the rehabilitation of real property located in an enterprise zone. Except as provided in subparagraph 2, this exemption inures to the owner, lessee, or lessor at the time the real property is rehabilitated, but only through a refund of previously paid taxes. To receive a refund pursuant to this paragraph, the owner, lessee, or lessor of the rehabilitated real property must file an application under oath with the governing body or enterprise zone development agency having jurisdiction over the enterprise zone where the business is located, as applicable. A single application for a refund may be submitted for multiple, contiguous parcels that were part of a single parcel that was divided as part of the rehabilitation of the property. All other requirements of this paragraph apply to each parcel on an individual basis. The application must include:

a. The name and address of the person claiming the refund.

b. An address and assessment roll parcel number of the rehabilitated real property for which a refund of previously paid taxes is being sought.

c. A description of the improvements made to accomplish the rehabilitation of the real property.

d. A copy of a valid building permit issued by the county or municipal building department for the rehabilitation of the real property.

e. A sworn statement, under penalty of perjury, from the general contractor licensed in this state with whom the applicant contracted to make the improvements necessary to rehabilitate the real property, which lists the building materials used to rehabilitate the real property, the actual cost of the building materials, and the amount of sales tax paid in this state on the building materials. If a general contractor was not used, the applicant, not a general contractor, shall make the sworn statement required by this sub-subparagraph. Copies of the invoices that evidence the purchase of the building materials used in the rehabilitation and the payment of sales tax on the building materials must be attached to the sworn statement provided by the general contractor or by the applicant. Unless the actual cost of building materials used in the rehabilitation of real property and the payment of sales taxes is documented by a general contractor or by the applicant in this manner, the cost of the building materials is deemed to be an amount equal to 40 percent of the increase in assessed value for ad valorem tax purposes.

f. The identifying number assigned pursuant to s. 290.0065 to the enterprise zone in which the rehabilitated real property is located.

g. A certification by the local building code inspector that the improvements necessary to rehabilitate the real property are substantially completed.

h. A statement of whether the business is a small business as defined by s. 288.703(1).

i. If applicable, the name and address of each permanent employee of the business, including, for each employee who is a resident of an enterprise zone, the identifying number assigned pursuant to s. 290.0065 to the enterprise zone in which the employee resides.

2. This exemption inures to a municipality, county, other governmental unit or agency, or nonprofit community-based organization through a refund of previously paid taxes if the building materials used in the rehabilitation are paid for from the funds of a community development block grant, State Housing Initiatives Partnership Program, or similar grant or loan program. To receive a refund, a municipality, county, other governmental unit or agency, or nonprofit community-based organization must file an application that includes the same information required in subparagraph 1. In addition, the application must include a sworn statement signed by the chief executive officer of the municipality, county, other governmental unit or agency, or nonprofit community-based organization seeking a refund which states that the building materials for which a refund is sought were funded by a community development block grant, State Housing Initiatives Partnership Program, or similar grant or loan program.

3. Within 10 working days after receipt of an application, the governing body or enterprise zone development agency shall review the application to determine if it contains all the information required by subparagraph 1, or subparagraph 2, and meets the criteria set out in this paragraph. The governing body or agency shall certify all applications that contain the required information and are eligible to receive a

refund. If applicable, the governing body or agency shall also certify if 20 percent of the employees of the business are residents of an enterprise zone, excluding temporary and part-time employees. The certification must be in writing, and a copy of the certification shall be transmitted to the executive director of the Department of Revenue. The applicant is responsible for forwarding a certified application to the department within the time specified in subparagraph 4.

4. An application for a refund must be submitted to the department within 6 months after the rehabilitation of the property is deemed to be substantially completed by the local building code inspector or by November 1 after the rehabilitated property is first subject to assessment.

5. Only one exemption through a refund of previously paid taxes for the rehabilitation of real property is permitted for any single parcel of property unless there is a change in ownership, a new lessor, or a new lessee of the real property. A refund may not be granted unless the amount to be refunded exceeds \$500. A refund may not exceed the lesser of 97 percent of the Florida sales or use tax paid on the cost of the building materials used in the rehabilitation of the real property as determined pursuant to subparagraph 1.e. or \$ 5,000, or, if at least 20 percent of the employees of the business are residents of an enterprise zone, excluding temporary and part-time employees, the amount of refund may not exceed the lesser of 97 percent of the sales tax paid on the cost of the building materials or \$10,000. A refund shall be made within 30 days after formal approval by the department of the application for the refund.

6. The department shall adopt rules governing the manner and form of refund

applications and may establish guidelines as to the requisites for an affirmative showing of qualification for exemption under this paragraph.

7. The department shall deduct an amount equal to 10 percent of each refund granted under the provisions of this paragraph from the amount transferred into the Local Government Half-cent Sales Tax Clearing Trust Fund pursuant to s. 212.20 for the county area in which the rehabilitated real property is located and shall transfer that amount to the General Revenue Fund.

8. For the purposes of the exemption provided in this paragraph, the term:

a. "Building materials" means tangible personal property which becomes a component part of improvements to real property.

b. "Real property" has the same meaning as provided in s. 192.001(12).

c. "Rehabilitation of real property" means the reconstruction, renovation, restoration, rehabilitation, construction, or expansion of improvements to real property.

d. "Substantially completed" has the same meaning as provided in s. 192.042(1).

9. This paragraph expires on the date specified in s. 290.016 for the expiration of the Florida Enterprise Zone Act.

22. The issue in this case is whether Epic is entitled to the \$10,000 refund allowed when at least 20 percent of the employees of the refund applicant are residents of the Enterprise Zone.

23. The Department has adopted rules to implement the refund statute. They are Florida Administrative Code Rules 12A-1.107 and 12A-1.097. The Department interpreted and applied those rules in the Final Order of the Department of Revenue in The Angler Resorts, LLC v. State of Florida, Department of Revenue, Case No. DOR-08-17-FOI (Fla. Dept. of Rev., March 16, 2008) (Angler Resorts). The Angler Resorts Final Order holds that Forms EZ-E and DR-26S incorporated by Department rule do not authorize the Department to require exemption applicants whose Application for Eligibility have been certified by Enterprise Zone Coordinator to provide additional information supporting the statements about the number or residence of employees.

24. Although Angler Resorts involved Section 212.08(5)(h), Florida Statutes (2008), it is relevant here because the provisions of subsections (g) and (h) involving the percentage of employees residing in the enterprise zone are the same. Also the employment and certification portions of the form EZ-M in this case are the same as those in Form EZ-E interpreted and applied in Angler Resorts. Compare Department Exhibit 3 to Form EZ-E found at <http://www.floridaenterprisezone.com/Zones/Org1/uploads/BEREFUNDrevised-09-2008.DOC>. Likewise the Form DR-26S is the same. Compare Department Exhibit 1 to Form

Dr-26S found at

<http://dor.myflorida.com/dor/forms/2008/dr26s.pdf>.

25. Application of Angler Resorts results in the conclusion that Epic did not have to provide further information about the residence and number of employees as certified by the Enterprise Zone coordinator. This is true even though Epic did not establish the individuals were Epic employees. In fact the evidence establishes that they are not Epic employees. But Angler Resorts holds that once the Application for Eligibility has been certified by the Enterprise Zone Coordinator, further information about the employer and employees may not be required or considered.

26. The similarity of the rules and forms involves requires application of Angler Resorts. The reasoning of the Department in Conclusion of Law 14 of Angler Resorts about Section 212.08(5)(h), Florida Statutes, and Form EZ-E cannot be reasonably rejected in interpreting Sections 212.08(5)(g), Florida Statutes, and Form EZ-M when the same Department is applying identical provisions of its rules and forms. In Conclusion of Law 14 the Department stated:

Section 212.08(5)(h)6, Florida Statutes permits the Respondent [Department] to establish guidelines as to what is necessary to show qualification for the exemption. Respondent has provided guidelines in Forms EZ-E and DR-26S, incorporated by rule in compliance with Chapter 120, F.S. These

guidelines do not include the information requested by the Notice of Intent to Make Tax Refund Claims changes for that refund.

Given the specific nature of the certification process provided in Section 212.08(5)(h), Florida Statutes, and the permissive nature of the grant of authority to establish the guidelines for the requisites for a necessary showing of qualification for the exemption, the information requested in the Attachment to Respondent's Notice of Intent to Make Tax Refund Claim Changes . . . falls outside that required by the implemented statute or rule (which includes Forms EZ-E and DR-26S, incorporated by reference in Respondent's rules). Accordingly, Petitioner's claims for refund in excess of \$5000 should not have been denied on the basis of failure to produce the requested information. Additional documentary requirements should be subject to the rulemaking process governed by Section 120.54, Florida Statutes.

27. The Department maintains that Angler Resorts should not be applied in this case. It argues that following the Department's Final Order in Angler Resorts would impermissibly infringe on the Department's authority. The law is to the contrary.

28. An agency has authority to interpret the statutes over which it has substantive jurisdiction, as well as its own rules. L.B. Bryan & Co. v. School Bd., 746 So. 2d 1194 (Fla. 1st DCA 1999). The agency's interpretation is entitled to due deference. See Florida Wildlife Federation v. Collier County, 819 So. 2d 200 (Fla. 1st DCA 2002); D.A.B. Constructors, Inc. v.

State, Dep't of Transportation, 656 So. 2d 940 (Fla. 1st DCA 1995); Florida Hospital Association, Inc. v. Health Care Cost Containment Board, 593 So. 2d 1137 (Fla. 1st DCA 1992). The agency's interpretation does not have to be the only or the best interpretation.

29. The interpretation in Angler Resorts is not the only or the best interpretation. But the Final Order in Angler Resorts is the Department's interpretation and application of a statute it is charged with administering and of rules and forms that it adopted. It is a Final Order, not argument in a proceeding where the Department is merely a litigant. It applies here.

30. The Department has the power to amend the rules, as it noted in Angler Resorts in March, 2008. It has not done so, although the Department appears to have begun the process. The Department noticed development of rule amendments to Florida Administrative Code Rule 12A-1.107(3), Notice of Development of Rule Making, Florida Administrative Weekly, November 6, 2009, Vol. 35, p. 44.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is Recommended that the Department of Revenue grant Epic's refund application and approve a sales tax refund for the total amount of \$10,000.

DONE AND ENTERED this 2nd day of August, 2010, in
Tallahassee, Leon County, Florida.



JOHN D. C. NEWTON, II
Administrative Law Judge
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Filed with the Clerk of the
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this 2nd day of August, 2010.

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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.