

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF REVENUE,)
)
 Petitioner,)
)
 vs.) Case No. 10-2836
)
 ABKEY NO. 1 LIMITED,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on October 6, 2010, in Miami, Florida, before Errol H. Powell, an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Carrol Y. Cherry, Esquire
Office of the Attorney General
Revenue Litigation Bureau
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

For Respondent: Betty Amos, pro se
Abkey No. 1 Limited
9275 Coral Reef Drive, Suite 107
Miami, Florida 33157

STATEMENT OF THE ISSUE

The issue for determination is whether Respondent committed the offenses set forth in the Administrative Complaint for

Revocation of Certificate of Registration issued on November 16, 2009, and, if so, what action should be taken.

PRELIMINARY STATEMENT

The Department of Revenue, hereinafter Department, issued an Administrative Complaint for Revocation of Certificate of Registration, hereinafter Administrative Complaint, against Abkey No. 1 Limited, hereinafter Abkey, on November 16, 2009. The Department charged Abkey with the continued failure to file required tax returns and remit sales tax in violation of chapter 212, Florida Statutes, by: (a) failing to file a tax return and pay the tax liability for the month of June 2009; (b) failing to remit sales tax due and owing for the periods of: (i) July and September through December 2005; (ii) January, May and October 2006; and (iii) February, August and October 2007; (c) failing to remit payment for interest due and owing; (d) failing to remit payment for penalties due and owing; and (e) issuing a dishonored check to the Department for the period of February 2007. Abkey, through its president, Betty Amos, disputed the material allegations of fact and requested a hearing. On May 25, 2010, this matter was referred to the Division of Administrative Hearings.

At hearing, the Department presented the testimony of one witness and entered ten exhibits (Petitioner's Exhibits numbered 2 through 5, 8, 9, 20, and 21 through 23) into evidence. Abkey

presented the testimony of one witness, Ms. Amos, and entered one exhibit (Respondent's Exhibit numbered 1)¹ into evidence.

A transcript of the hearing was not ordered. At the request of the parties, the time for filing post-hearing submissions was set for more than ten days following the conclusion of the final hearing. The parties timely filed their post-hearing submissions. However, Abkey attached several documents to its post-hearing submission that were neither offered nor admitted into evidence at hearing. Subsequently, the Department filed a Motion to Strike, to which Abkey objected. The Department's Motion to Strike is granted. Abkey's documents that were not admitted into evidence at hearing and any proposed facts and conclusions based upon the documents have not been considered in the preparation of this Recommended Order. The Department's post-hearing submission has been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. There is no dispute that the Department is the state agency charged with the responsibility of regulating, controlling, and administering the revenue laws of the State of Florida, including the laws relating to the imposition and collection of the state's sales and use tax pursuant to chapter 212, Florida Statutes.

2. There is no dispute that Abkey is a Florida corporation whose principal address is 7800 Southwest 104th Street, Miami, Florida 33156.

3. Abkey is a restaurant. At the time of hearing, Abkey had 33 employees and was operating at a deficit.

4. There is no dispute that, at all times material hereto, Abkey possessed Florida sales tax certificate of registration number 23-8012096448-9, issued by the Department on April 18, 1994.

5. There is no dispute that Abkey is a dealer as defined in section 212.06(2), Florida Statutes, and has been a dealer at all times material hereto.

6. For the month of June 2009, Abkey failed to file a sales tax return. As a result of this failure, the Department assessed Abkey an estimated sales tax due in the amount of \$9,500.00.

7. For 2005, Abkey failed to remit its self-reported sales tax liability to the Department for the months of July, September, October, November, and December. Abkey self-reported its tax liability, by filing sales tax returns, for the said months.

8. For 2006, Abkey failed to remit its self-reported sales tax liability to the Department for the months of January and May. Abkey self-reported its tax liability, by filing sales tax

returns, for the said months. Also, for 2006, Abkey failed to timely remit its sales tax liability for the month of October for which the Department assessed a penalty and an administrative/collection/processing fee.

9. For 2007, Abkey failed to remit its self-reported sales tax liability to the Department for the months of February and August. Abkey self-reported its tax liability, by filing sales tax returns, for the said months. Also, for 2007, Abkey failed to timely remit its sales tax liability for the month of October, for which the Department assessed a penalty and an administrative/collection/processing fee.

10. In total, for 2005, 2006, and 2007, Abkey self-reported sales tax due and failed to remit to the Department sales tax reportedly due in the amount of \$122,355.36.

11. As a result of Abkey's failure to file the sales tax return, to remit the \$122,355.36 in sales tax, and to remit timely sales tax, the Department assessed Abkey, as of October 29, 2009, \$16,287.59 in interest, \$4,891.73 in penalties, and \$13,845.10 in administrative/collection/processing fees.

12. Additionally, for the month of February 2007, Abkey issued to the Department a dishonored check (electronic funds transfer) on March 23, 2007, in the amount of \$18,254.00. The Department assessed a \$150.00 return check fee for the

dishonored check. Shortly after being notified of the dishonored check by the Department, Abkey paid the \$18,254.00.

13. Abkey has a significant history of delinquency in remitting payments to the Department. The Department made several attempts, unsuccessfully, to collect the delinquent tax liabilities, including issuing Tax Warrants.

14. In January 2007, the Department sought to revoke Abkey's Certificate of Registration for delinquent returns and outstanding liability and engaged in an informal conference with Abkey. As a result of the informal conference, Abkey and the Department entered into a Compliance Agreement executed on February 15, 2010.

15. The Compliance Agreement required Abkey, among other things, to remit all past due payments; for 12 months (January through December 2007), to timely file tax returns and to timely remit all sales tax due; and to make a down payment of \$45,000.00 (in three monthly installments but no later than April 1, 2007), 11 monthly payments of \$5,000.00 (beginning May 1, 2007), and a balloon payment of \$141,982.43 on April 1, 2008.

16. Further, regarding the balloon payment of \$141,982.43, the Compliance Agreement provided that the balloon payment might be negotiated for another 12 months. However, in order for Abkey to take advantage of this provision, Abkey was required to

be compliant with the terms of the Compliance Agreement and its account was required to be in good standing with the Department.

17. In accordance with the Compliance Agreement, Abkey paid the down payment of \$45,000.00 (in three monthly installments) and the 11 payments of \$5,000.00 although the 11 payments were late. Additionally, for the period of January through December 2007, Abkey was late filing tax returns and remitting sales tax.

18. Abkey requested a renewal of the Compliance Agreement. Despite the late payments, the Department approved the renewal of the Compliance Agreement.

19. A Compliance Agreement Renewal was executed on May 1, 2008. It required Abkey, among other things, to remit all past due payments and to timely file tax returns and timely remit all sales tax due for the next 12 months (May 1, 2008 through April 30, 2009); and to make 11 monthly payments of \$5,000.00 (beginning May 1, 2008), and a balloon payment of \$120,749.14 on April 1, 2009.

20. Furthermore, regarding the balloon payment of \$120,749.14, the Compliance Agreement Renewal provided that the balloon payment might be negotiated for another 12 months. However, in order for Abkey to take advantage of this provision, Abkey was required to be compliant with the terms of the

Compliance Agreement Renewal and its account was required to be in good standing with the Department.

21. Under the Compliance Agreement Renewal, Abkey made four payments of \$5,000.00 but the payments were late.

22. Abkey requested a reduction in the amount of the monthly payments from \$5,000.00 to \$2,000.00. The Department granted Abkey's request. Abkey made 12 payments of \$2,000.00 but the payments were late. Additionally, for the period of May 1, 2008 through April 30, 2009, Abkey was late filing tax returns and remitting sales tax.

23. Further, Abkey failed to make the balloon payment of \$120,749.14 that was due on April 1, 2009. Abkey did not request a renegotiation of the balloon payment.

24. At that time, Abkey did not request another Compliance Agreement.

25. As of September 28, 2010, Abkey owed the Department \$122,355.36 in actual sales tax (per Abkey's sales tax returns), \$9,500.00 in estimated tax, \$4,419.73 in penalty², \$14,572.80 in administrative/collection/processing fees³, \$25,032.28 in interest, and \$20.00 in warrant fees; totaling \$175,900.17.

26. The Department seeks to revoke Abkey's Certificate of Registration.

CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto pursuant to sections 120.569 and 120.57(1), Florida Statutes (2010).

28. The Department has the burden of proof to show by clear and convincing evidence that Abkey committed the offenses set forth in the Administrative Complaint for Revocation of Certificate of Registration. Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

29. Chapter 212, Florida Statutes (2009)⁴, is the authorizing statute in these proceedings.

30. Pursuant to section 212.18, the Department is authorized to issue a certificate of registration to every person desiring to engage in or conduct business in the State of Florida as a dealer. The certificate of registration grants dealers the privilege of engaging in or conducting business in the State of Florida. § 212.05, Fla. Stat.

31. "Dealer" is defined in section 212.06. Abkey is a dealer as defined in section 212.06.

32. Pursuant to section 212.18, the Department is authorized to revoke a dealer's certificate of registration for failure to comply with the requirements of chapter 212.

33. Dealers are required to collect and remit to the Department all sales and use tax due. § 212.06, Fla. Stat.

34. All sales and use tax collected by dealers becomes the property of the Department at the moment of collection. § 212.15, Fla. Stat.

35. For the purpose of ascertaining the amount of tax due under chapter 212, a dealer is required to file with the Department a sales and use tax return on or before the 20th day of the succeeding month for the tax due the preceding calendar month. § 212.11, Fla. Stat.

36. Abkey failed to remit to the Department sales tax due for several months in 2005, 2006, and 2007, and to timely remit sales tax due for one month in 2006 and in 2007. As a result, the Department was authorized to assess a penalty, fees, and interest. § 212.12(2), (3), and (4), Fla. Stat.

37. Further, the Department was authorized to issue and file tax warrants in the public records for collection of Abkey's outstanding liability for tax, penalty, fees, and interest. § 212.15(4), Fla. Stat.

38. Abkey failed to comply with the terms of the Compliance Agreement Renewal.

39. If a dealer fails to file a tax return when due, the Department is authorized to assess the dealer an estimated tax due. § 212.12(5), Fla. Stat. As a result of Abkey's failing to file a tax return for June 2009, the Department was authorized to assess an estimated tax due in the amount of \$9,500.00.

40. Additionally, Abkey failed to remit the estimated sales tax due for June 2009. As a result, the Department was authorized to assess a penalty, fee, and interest. § 212.12(2), (3), and (4), Fla. Stat.

41. Also, for the dishonored check, the Department was authorized to assess a service fee. § 215.34(2), Fla. Stat. (2009). The service fee of \$150.00 was appropriate.

42. The Department's assessment of \$4,419.73 in penalty, \$14,572.80 in administrative/collection/processing fees, and \$25,032.28 in interest against Abkey was appropriate.

RECOMMENDATION

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

RECOMMENDED that the Department of Revenue enter a final order revoking the Certificate of Registration issued to and held by Abkey No. 1 Limited.

DONE AND ENTERED this 18th day of February, 2011, in
Tallahassee, Leon County, Florida.

Errol H. Powell

ERROL H. POWELL
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of February, 2011.

ENDNOTES

^{1/} Respondent's Exhibits numbered 1 through 4 were offered but not admitted into evidence.

^{2/} As of October 29, 2009, for the late return of October 2007, the Department assessed a penalty in the amount of \$524.44. However, as of September 28, 2010, for the late return of October 2007, the assessed penalty was revised to \$52.44.

^{3/} As of October 29, 2009, for the late return of October 2007, the Department assessed an administrative/collection/processing fee in the amount of \$52.44. However, as of September 28, 2010, for the late return of October 2007, the assessed administrative/collection/processing fee was revised to \$0.00.

^{4/} All future references to chapter 212 will be for 2009.

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.