CHIEF FINANCIAL OFFICER
JEFF ATWATER
STATE OF FLORIDA

IN THE MATTER OF:

Case No. 110805

FICURMA, INC.
_____/

FINAL ORDER

This cause came on for consideration of and final agency action on the Recommended Order rendered by Administrative Law Judge Elizabeth W. McArthur (ALJ) on July 8, 2011, after formal hearing held on March 10, 2011. FICURMA, Inc., (FICURMA) timely filed exceptions thereto. The Recommended Order, the transcript of proceedings, the admitted evidence, FICURMA'S exceptions, and applicable law have all been considered during the promulgation of this Final Order.

RULINGS ON FICURMA'S EXCEPTIONS

FICURMA's first exception is to the Findings of Fact in Paragraph Seven of the Recommended Order, where the ALJ found department employee Ms. Evelyn Vlasak to have said certain things to a Mr. Donatelli with FICURMA. However, a review of the exception shows no tangible disagreement with that finding, and no assertion that it is not supported by competent substantial evidence. There is no contention that Ms. Vlasak did not say those things or that she said something different, and the record testimony supports the finding. (Tr. 39-41) The exception merely argues that the finding supports its estoppel argument, an argument the ALJ rejected. Essentially, the exception invites a re-weighing of the evidence in favor of its rejected estoppel

argument, an invitation which must be declined. *Perdue v. TJ Palm Associates, Ltd.*, 755 So.2d 660 (Fla. 4th DCA 1999); *Heifetz v. Department of Business Regulation, Div. of Alcoholic Beverages and Tobacco*, 475 So.2d 1277 (Fla. 1st DCA 1985); *Holmes v. Turlington*, 480 So.2d 150 (Fla. 1st DCA 1985); *Howard Johnson v. Kilpatrick*, 501 So.2d 61 (Fla. 1st DCA 1987). Accordingly, this exception is rejected.

FICURMA's second exception is directed to the Findings of Fact in Paragraph Twelve of the Recommended Order, where the ALJ found that FICURMA raised no legal challenge to the assessment in question and paid them without protest. Again, the exception takes no direct issue with the finding, raising no contention that the assessments were not paid or that any legal challenge thereto was, in fact, filed, or that the finding is not supported by competent substantial evidence. The exception merely argues that FICURMA elected not to challenge the assessments because it was the department's position at the times in question that the assessments were proper, and FICURMA wanted to be a "good citizen". (Tr. 67) The record fully supports the challenged finding; that was the Department's position and FICURMA raised no legal challenge to that position. (Tr. 39-42, 50-52, 67; Joint Exhibit 15) Accordingly, the exception is rejected.

FICURMA's third exception is directed to the Findings of Fact in Paragraph 22 of the Recommended Order, but, as with the previous exceptions, it takes no direct issue with those findings or contends that they are not supported by competent substantial evidence. To successfully challenge a finding of fact, an exception must show from a review of the entire record that the challenged findings are not supported by competent substantial evidence, or that the proceedings on which the findings were based did not

comply with the essential requirements of law. [Section 120.57(l), Fla. Stat.] No such showings are even attempted by the third exception. Accordingly, it is rejected.

FICURMA next takes exception to the Conclusions of Law announced in Paragraphs 41-43 of the Recommended Order, arguing, contrary to the ALJ's conclusions, that the doctrine of equitable estoppel should be applied to require a full refund of monies collected beyond the three year refund period specified in Section 215.26, Fla. Stat. In preceding paragraphs, the ALJ thoroughly analyzed the application of that doctrine, and concluded that because Section 215.62, *supra,* is a non-claim statute and not a statute of limitations, and because the department's representations of FICURMA's susceptibility to assessments were representations of law and not of fact, the elements required for the application of the doctrine of equitable estoppel were absent and the doctrine could not, therefore, be applied. In so doing, the ALJ analyzed the cases of *Hardy, Hardy & Associates, Inc., v. State, Dept. of Revenue*, 308 So.2d 187 (Fla. 1st DCA 1975), (Hardy), and *Associated Indus.Ins. Co. v. State, Dep't of Labor and Emp. Sec.* 923 So.2d 1252 (Fla. 1st DCA 2006), (Associated Industries), and found *Hardy* distinguishable and not controlling and that this case was more akin to the fact situation in *Associated Industries* where, as here, the representations in question were based on statutory interpretations made by department personnel. Moreover, as the ALJ noted, none of the written communications between the Department of Revenue and Hardy contained a notice of rights indicating a clear point of entry into the administrative process to challenge the agency's assessment actions, as did all the assessment notices at issue here. The ALJ's sound and considered analysis and

conclusions flowing therefrom cannot be reasonably set aside in favor of any substituted conclusion. Accordingly, this exception is rejected.

FICURMA next excepts to the Conclusions of Law set forth in Paragraphs 44-46 of the Recommended Order where the ALJ concluded that the instant case was distinguishable from *Hardy, supra,* and more like *Associated Industries, supra,* on the basis that, just as in *Associated Industries, supra*, FICURMA never sought to confirm or challenge the agency action in question using the APA's "impressive arsenal of varied and abundant remedies for administrative error", even though every assessment notice provided a point of entry into the administrative process for FICURMA to do just that. Just as in *Associated Industries*, *supra*, the ALJ concluded, the absence of such a challenge militates against a finding of reliance, an element necessary to the application of the doctrine of promissory estoppel.

This exception also addresses the concept of laches as an affirmative defense not timely raised by the Department. However, as the ALJ did not address that defense in the Recommended Order, the exception is not cognizable in that regard.

For the above stated reasons, the exception is rejected.

The last "exception" raised by FICURMA involves what it deems an excessive amount of time (about six weeks) for the Department to communicate its October 2009 non-assessment memo to FICURMA. However, the exception does not set forth any legal basis for that assertion or establish any legal remedy for same. Accordingly, the exception is irrelevant and is rejected. [Section 120.57(k), Fla. Stat.]

Therefore, IT IS HEREBY ORDERED AND ADJUDGED that the ALJ's Findings of Fact and Conclusions of Law are adopted as the Department's Findings of Fact and

Conclusions of Law, and that FICURMA'S requests for refunds from the SDTF and WCATF assessments in 2005 and 2006 are denied.

DONE AND ORDERED this 23rd day of September, 2011.

Robert C. Kneip
Chief of Staff

NOTICE OF RIGHTS

Any party to these proceedings adversely affected by this Order is entitled to seek review of this Order pursuant to Section 120.68, Florida Statutes, and Rule 9.110, Fla. R. App. P. Review proceedings must be instituted by filing a petition or notice of appeal with Julie Jones, DFS Agency Clerk, Department of Financial Services, 612 Larson Building, 200 East Gaines Street Tallahassee, Florida, 32399-0390, and a copy of the same with the appropriate district court of appeal, within thirty (30) days of rendition of this Order. Filing may be accomplished via U.S. Mail, express overnight delivery, or hand delivery. Filing cannot be accomplished by facsimile transmission or electronic mail.

Copies to:
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