STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

REISER, INC.,

Petitioner,

vs.

DEPARTMENT OF REVENUE,

Respondent.

Case No. 10-8136

RECOMMENDED ORDER

A formal administrative hearing was conducted in this matter before Administrative Law Judge W. David Watkins of the Florida Division of Administrative Hearings, on February 9, 2011, in Daytona Beach, Florida.

APPEARENCES

For Petitioner: Leanne Siegfried, Esquire
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For Respondent: John Mika, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Petitioner collected and remitted to Respondent the correct amount of sales and use taxes during the

audit period from March 1, 2006, through February 28, 2009, and, if not, what additional amount of tax and interest is due.

PRELIMINARY STATEMENT

On April 6, 2010, Respondent issued a Notice of Proposed Assessment to Petitioner to collect $36,564.82 in taxes, and $8,743.02 in interest (through April 6, 2010), or a total of $45,307.84 for the audit period. On August 4, 2010, Respondent received the challenge to the proposed assessment in a Petition for Formal Administrative Hearing, which was forwarded to the Division of Administrative Hearings (DOAH) on August 20, 2010, and assigned DOAH Case Number 10-8136.

A hearing was scheduled for November 30, 2010, but it was cancelled after the Respondent filed an Emergency Motion for Continuance. On December 3, 2010, the parties filed a request to reschedule the final hearing, and by Notice of Hearing, the case was set for final hearing, and the hearing was held on February 9, 2011.

At the hearing, Respondent presented the testimony of an auditor, Lori Krueger. Respondent's Exhibits 1-13, 15, 16, 18 and 19 were received in evidence. Petitioner presented the testimony of Paula Gregory and James Allen Reiser. Petitioner's Exhibits 1 and 2 were received in evidence. The Transcript of the hearing was filed on February 28, 2011. Proposed Recommended Orders were filed with the Division by both

Petitioner and Respondent on May 9, 2011, and have been given due consideration in the rendition of this Recommended Order.

All statutory references are to Florida Statutes (2006), and all rule references are to the current Florida Administrative Code, unless otherwise indicated.

FINDINGS OF FACT

1. Petitioner Reiser, Inc. (Petitioner, taxpayer, or Reiser), a Florida corporation, operated a Creative Playthings franchise from late 2004 through early 2009. Reiser has not conducted any business since early 2009.

2. Reiser was in the business of selling recreational playground equipment and related services, including installation, maintenance and repair. In addition, playground equipment on display at Petitioner's business location was also made available for use during purchased "birthday parties," which also included party supplies, food and beverages.

3. Respondent, Florida Department of Revenue (Respondent, Department, or DOR), is the agency of state government authorized to administer the tax laws of the State of Florida, pursuant to section 213.05, Florida Statutes.

4. DOR is authorized to prescribe the records to be kept by all persons subject to taxes under chapter 212, Florida Statutes. Such persons have a duty to keep and preserve their records, and the records shall be open to examination by DOR or

its authorized agents at all reasonable hours pursuant to section 212.12(6), Florida Statutes.

5. DOR is authorized to conduct audits of taxpayers and to request information to ascertain their tax liability, if any, pursuant to section 213.34.

6. On April 10, 2009, DOR sent a Notification of Intent to Audit Books and Records to Petitioner. The audit period was from March 1, 2006, through February 28, 2009. The audit itself was conducted between May 14, 2009, and March 24, 2010.

7. For the purposes of the audit, Petitioner's accountants, Weston & Gregory, P.A., acted as Petitioner's agents. The accounting firm's employees, Paula Gregory, Cathy Duffy, and Amber Schottenham, were Petitioner's designated representatives under the power of attorney executed by Reiser.

8. On January 15, 2010, DOR sent Reiser its Notice of Intent to Make Audit Changes (NOI), with schedules, showing that Reiser owed to DOR additional sales and use taxes in the amount of $42,242.80, and interest through January 16, 2010, in the amount of $9,562.40, making a total assessment in the amount of $51,810.20.

9. On February 24, 2010, DOR sent Reiser a Revised Notice of Intent to Make Audit Changes (NOI), with schedules, showing that Reiser owed to DOR additional sales and use taxes in the amount of $36,564.82, and interest through February 24, 2010, in

the amount of $8,455.51, and a penalty in the amount of $9141.22, making a total assessment in the amount of $54,161.55.

10. Each of the Department's NOIs informed Petitioner of the right to request an audit conference prior to March 26, 2010, if it did not agree with the adjustments. The invitation to request an audit conference prior to March 26, 2010, was again extended to Petitioner by letter dated March 16, 2010.

11. By letter dated March 16, 2010, and received by the Department on March 23, 2010, Petitioner requested an extension of time (in order to seek legal counsel) and notified the Department of his desire to have an audit conference.

12. The following day the Department sent Petitioner a letter advising that the request for an extension of time was being denied, and that "[T]he case file will be forwarded to Tallahassee for further processing." As a consequence, Petitioner did not receive an audit conference.

13. On April 6, 2010, Respondent issued a Notice of Proposed Assessment to Petitioner to collect $36,564.82 in taxes, and $8,743.02 in interest (through April 6, 2010), or a total of $45,307.84 for the audit period. No penalties were included with the assessment.

14. The proposed assessments related to five different categories of alleged tax deficiencies. Those categories, and the amounts at issue are:

1) Misclassified exempt sales ($13,371.44);

2) Disallowed exempt sales ($5,110.00);

3) Taxable sales-maintenance program ($11,700.00);

4) Unreported sales ($6,316.56);

5) Fixed assets ($66.82).

15. Reiser timely challenged the Notice of Proposed Assessment, filing its petition with DOR and requesting an administrative hearing.

The Statistical Sampling Method

16. The Department is authorized by statute to utilize sampling techniques in its record review, if the records of the taxpayer are "voluminous in nature and substance." Section 212.12(6)(c), Florida Statutes, contemplates a good faith effort to reach an agreement with the taxpayer as to the means and methods to be used in the sampling process. In the event no agreement is reached, the taxpayer is entitled to a review by the Executive Director of DOR.

17. The audit conducted by the Department used a statistical sampling method. The decision to use the sampling method, and the selection of the sampling periods for the audit, are both reflected in the "Sampling Plan" bearing the DOR report

date of May 18, 2009. In addition, the "Case Activity Record" for the audit reflects that on May 18, 2009, DOR auditor Lori Krueger "met with PGM[1/] to discuss audit plan and sample periods." The case activity record also reflects that it wasn't until June 23, 2009, that Auditor Krueger "review(ed) electronic records rec'd." It therefore appears that the Department had not evaluated whether Petitioner's records were "voluminous in nature and substance" before reaching the decision to utilize a sampling method.[2/]

18. A written "Sampling Agreement" was signed by Auditor Krueger on January 7, 2010. However, there is no persuasive evidence in this record that Petitioner or any of its designated representatives agreed to the sampling plan proposed by DOR. Likewise, there is no evidence to indicate that DOR's Executive Director reviewed the proposed sampling method for the audit.

19. The audit periods selected by the Department included the months of June 2006; January 2008; and December 2008. During the course of the audit, Petitioner provided all records available to it which were requested by the DOR auditors.

20. As a Creative Playthings franchisee, all of Petitioner's transactions were entered into the "Counterpoint" software provided by the franchisor. Sales tax was assessed and accounted for via the software's programming, and Petitioner had no ability to change the software. As such, Petitioner relied

on the software to properly designate taxable and non-taxable transactions.

Misclassified Exempt Sales

21. Misclassified exempt sales consisted of either birthday party packages sold at taxpayer's location, or gift certificates redeemed for merchandise. As to the birthday party sales, the package included invitations, Thank You notes, party host/helper, pizza, beverages, birthday cake, goody bags, all paper goods, balloons, treasure hunt along with prizes, and the use of the demo playground/gym equipment at Petitioner's facility. DOR determined this activity to be the license to use real property (the showroom facility), license to use tangible personal property (the gym equipment), and the sale of tangible personal property (gift bags, invitations, food, party favors) for a lump sum. DOR determined the additional tax due from misclassification of the referenced sales to be $13,371.44.

22. Petitioner's owner, James Riser, Jr., explained the nature of the birthday parties that were sold by his business:

> "I saw the need in the area for a place for - - a place for birthday party services for the area. There was nothing in the Ormond Beach area that catered towards parents and kids having birthday parties. So, I decided to do what basically is a birthday party planner, slash service. And literally take the entire process of the birthday party

> away from the parents and put in our hands
> to manage and control the entire birthday
> party process."

(Final Hearing Transcript, Page 162)

23. The services provided by Petitioner included planning for the theme selected by the purchaser; customizing all invitations, Thank You cards, paper goods, and games to match such theme; staffing the premises with enough personnel for supervision during the party; and clean-up after the party. Additional services included arranging for pizza and cake delivery, as well as ordering a cake customized to the party's theme, if requested. Non-consequential items, such as food, dining supplies and goodie bags were included in the birthday party package price paid by the purchaser. Reiser paid sales tax on all Items purchased for the party.

24. The fee for birthday parties was set at a flat rate for a party of up to 12 children. Additional charges applied for each child above 12 to help cover the increased costs which arose from employing additional persons to supervise and clean-up a party for more than twelve.

25. In addition to meeting the need for a birthday party planner/service, hosting the parties within Petitioner's business also served as a marketing tool for the playground equipment located there. Toward that end, all children entering Petitioner's premises, regardless of whether the child was

attending a party, were free to play on swing set displays throughout the entire premises.

26. According to DOR, the other misclassified exempt item related to gift certificates redeemed for merchandise by Petitioner. DOR correctly noted that the use of a gift certificate in lieu of cash, check or credit card does not render the transaction exempt. However, the unrebutted evidence established that the gift cards were given to customers as a refund or discount, because the Counterpoint software did not allow the franchise to provide a refund or discount directly to the customer during or after a purchase. No additional income was received by Petitioner for the gift cards given to customers.

Disallowed Exempt Sales

27. Disallowed exempt sales related to sales for which Petitioner did not collect and remit tax, and did not provide a resale or exemption certificate establishing the exempt nature of the sale.

28. Petitioner occasionally sold swing sets to individuals or organizations that were entitled to purchase such sets tax-free. However, it was incumbent on Petitioner to obtain a tax-exempt certificate from the purchaser for all tax-free sales it made.

29. In determining a tax liability under this category DOR did not review the transactions of each of the 36 months of the audit period, but instead employed a percentage of error methodology, determined from the review of the three sample months. The determined error ratio was then apportioned across the complete audit period. The result was a projected tax liability of $5,110.00.

30. Initially, the Department determined that three transactions were improperly classified as disallowed exempt. After review, two of these sales were found to be properly documented, and the number of allegedly non-compliant transactions was reduced to one. The remaining sale was to the parents of C.B., an autistic child. C.B.'s father told Mr. Reiser that the transaction should be tax exempt because he had a prescription for the swing set, as C.B.'s physician believed the swing set would assist with C.B.'s autism. The sale of the equipment totalled $4,860.00, which if taxable, would have generated a tax liability of $315.90. Petitioner was unable to produce a copy of the tax-exempt certificate relating to this sale.

Taxable Sales-Maintenance Program

31. The next category of alleged deficiency was taxable sales relating to the maintenance programs offered to Petitioner's customers. DOR took the position that whether

called a "maintenance program" or an "extended warranty program," these transactions were in essence the purchase of a service warranty, to wit, a contract or agreement to maintain, repair or replace tangible personal property, whether or not the contract provided for the furnishing of parts. Because Petitioner provided no records regarding the total amount of revenue received from its maintenance program sales, DOR estimated this amount based on the auditor's audit experience in this particular industry. The additional tax projected to be due under this category of sales was $11,700.00.

32. Petitioner's franchisor, Creative Playthings, provided a warranty on all equipment sold by Petitioner. In addition to this free warranty, Petitioner also offered for sale extended warranties at the time the swing set was purchased. However, an extended warranty could not be purchased after the swing set was installed. If a customer purchased an extended warranty, sales tax was assessed at the time of purchase. Mr. Reiser testified that only one or two extended warranties were sold. In those instances the warranties were included in the total purchase price for the equipment, and tax was collected on the full amount.

33. Separate from the warranties, Petitioner also offered maintenance services which swing set purchasers could request at any time after their swing set was installed. All labor

associated with maintenance service was warranted for 30 days from the date the labor was performed. Maintenance services Petitioner provided included moving swing sets; hammering in stakes; tightening bolts; and resolving any issues with the wood used for the swing set. As explained by Mr. Reiser:

> After the sale, somewhere between 11 to 13 months after the sale, we would either call or mail a flyer to everyone that had purchased a swing set and said, "Hey, by the way, if you'd like we can come service your swing set." It was their option. They could call us or not call us. And we were just trying to provide that service to our customers.

(Final Hearing Transcript, Page 173)

34. If a customer wanted to add additional parts to its swing set assembly, such parts were not considered to be part of Petitioner's maintenance services; rather, the parts were purchased inclusive of any maintenance charges, and tax was remitted on the full amount. Mr. Reiser testified that Petitioner provided only four or five maintenance services per month.

35. Petitioner would charge the customer for the labor involved with servicing the swing set at the time the request was made. No customer could pre-pay for swing set maintenance.

Unreported Sales

36. DOR also asserts that Petitioner is liable for an additional $6,316.56 in tax as the result of unreported sales. This claim is predicated upon the difference between Petitioner's income as reported on its federal tax returns and gross receipts reported to the State of Florida on Form 1120S for the years 2007 and 2008.

37. Petitioner provided the Department with a reconciliation of these amounts based on the accounting method used by Creative Playthings. Specifically, Petitioner's software assessed sales tax immediately upon entering a transaction into the system, and payment of sales tax on the full amount of the sale was remitted accordingly, even if the entire purchase price had not yet been received. The software, however, did not "release" the transaction and designate any amounts received as income until installation of the equipment was complete.[3/] This often occurred months after the initial purchase was made. As a result, income was released, and marked as received for federal and state income tax purposes, months after sales tax was assessed and remitted. Thus, transactions that occurred near the end of a given year would not result in income received until the beginning of the following year.[4/]

38. Further, the amount of a sale did not always translate to the amount of actual income received and Petitioner, at

times, ultimately received less than the initial purchase price upon which sales tax was remitted in full. Discrepancies would arise due to non-payment by customers, or occasional refunds granted by Petitioner as a result of a delay caused by Creative Playthings in manufacturing or delivering the equipment. Thus, by the time Petitioner learned its actual income from a given sale, sales tax had already been remitted for the full amount of the sale.

Fixed Assets

39. DOR's final proposed assessment relates to fixed assets of the business, that is, depreciable assets purchased by Petitioner for general use in the operation of its business. Specifically, the Department asserts that Petitioner is liable for an additional $66.82 in tax due because of its failure to produce documentation proving that sales tax was paid on the purchase of the Startech software used in the business.

40. Mr. Reiser testified at hearing that he paid sales tax when he purchased the referenced software, and his testimony was uncontroverted.

Taxes Paid

41. Petitioner's accountant, Paula Gregory, testified that Petitioner actually overpaid sales tax in the amount of $46,822.96 during the period of March 2006, until the business closed in September, 2009. This occurred because the total

amount of sales Petitioner reported for all years it operated, and therefore paid sales tax on, exceeded the total amount of income actually earned on such sales. Ms. Gregory's testimony as to the amount of sales tax overpaid by Petitioner was unrebutted, and is found to be credible.

Total Additional Sales and Use Taxes Due

42. As asserted by the Department, the five categories of additional taxes due, plus interest, represent an underpayment of $45,307.84 in tax liability for the audit period. In its Proposed Recommended Order, Petitioner argues that should an underpayment be determined, it should be offset by the excess sales tax paid as the result of Petitioner's over-reporting its sales. The Department did not take a position on this issue in its Proposed Recommended Order.

43. Even assuming the entirety of the alleged underpayments at issue were proven by the Department (which they were not), the amount of the overpayments made by Petitioner ($46,822.96)[5/] would nevertheless exceed the tax owed ($45,307.84).

CONCLUSIONS OF LAW

44. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding pursuant to sections 72.011(1), 120.569, and 120.57(1), Florida Statutes (2010).

45. DOR has the burden of proof in this proceeding, but that burden is "limited to a showing that an assessment has been made against the taxpayer and the factual and legal grounds upon which the . . . department made the assessment." See § 120.80(14)(b)2., Fla. Stat.

46. The standard of proof is a preponderance of the evidence. See § 120.57(1)(j), Fla. Stat. A "preponderance" of the evidence means the greater weight of the evidence. See Fireman's Fund Indemnity Co. v. Perry, 5 So. 2d 862 (Fla. 1942).

47. Chapter 212, Florida Statutes, authorizes taxation on the sale of tangible personal property. In general, amounts paid for the rendition of services are not taxable. Furthermore, tangible personal property involved in professional services is also exempt from taxation. § 212.08(7)(v), Fla. Stat. See also Dep't of Rev. v. Quotron Systems, 615 So. 2d 774, at 777.

48. With respect to the Department's use of the non-statistical sampling method to project the alleged underpayments, section 212.12(6), provides in relevant part:

> (c)1. If the records of a dealer are adequate but voluminous in nature and substance, the department may sample such records, except for fixed assets, and project the audit findings derived therefrom over the entire audit period to determine the proportion that taxable retail sales bear to total retail sales or the proportion that taxable purchases bear to total

> purchases. In order to conduct such a sample, the department must first make a good faith effort to reach an agreement with the dealer, which agreement provides for the means and methods to be used in the sampling process. In the event that no agreement is reached, the dealer is entitled to a review by the executive director.

49. Under the facts of this case, the sampling method used by the Department is unauthorized, and would render an inequitable result. The Department failed to establish that Petitioner had agreed to the sampling methodology, and in fact, the "Sampling Agreement" offered in evidence, although signed by the DOR auditor, was not signed by a representative of Petitioner. Having failed to obtain Petitioner's consent to the sampling methodology, the Department also failed to establish that the sampling methodology was reviewed by its Executive Director, as required pursuant to section 212.12(6)(c)(1). Accordingly, in this instance the Department is not entitled to apply a statistical sampling methodology to project additional tax liability.

50. Petitioner's birthday party planning services constitute professional services which fall within the exemption set forth in section 212.08(7)(v). Although certain inconsequential elements, such as pizza, cards, and goodie bags, were included, Petitioner paid taxes for all such items upon

their purchase, and no separate charge for these items was made to groups purchasing the birthday party services.

51. Likewise, the fees charged for the birthday parties held at Petitioner's premises were not an admission charge, which is subject to taxation pursuant to section 212.04. Petitioner's business location was not a place of amusement, nor were tickets sold to each person entering the premises. In fact, all children, regardless of whether they were associated with a party, at any time, were invited to play on the swing sets located there. This distinguishes Petitioner's birthday party services from an admission fee charged for the use of equipment, such as with taxable admissions for activities such as bowling, golfing, swimming, or playing billiards. See e.g., Fla. Admin. Code R. 12A-1.005(3)(g).

52. The central purpose of the birthday parties was to provide services in organizing a party, followed by supervision and cleanup. Such services are not taxable pursuant to chapter 212. See Dept. of Rev. v. Camp Universe, Inc., 273 So. 2d 148, 149-150 (Fla. 1st DCA 1973) (holding "Although it is true that there is recreation, there is amusement, and there is sport at Camp Universe, the Court considers that to be more incidental and inclusive within the overall and overriding and more important service of giving custodial treatment to children, including supervising their activities and instruction.").

Accordingly, Petitioner is not responsible for sales tax associated with the sale of its birthday party services.

53. The evidence established that the gift cards which DOR asserts created a tax liability were not sold in exchange for income, but rather represented refunds or discounts extended to customers by Petitioner. Consequently, Petitioner is not responsible for sales tax for the gift cards when no income was ever received for same.

54. Regarding the tax exempt sales, it was undisputed that only one such sale occurred for which Petitioner could not produce the proper documentation. As noted above, the Department's use of a sampling methodology to inflate this single incident to a liability of $5,110.00 is rejected. However, inasmuch as Petitioner failed to produce evidence that the sale qualified for tax exemption, that tax liability of $315.90 must be borne by Petitioner.

55. Section 212.0506 provides that service warranties are subject to taxation. A service warranty is defined as a "contract or agreement which indemnifies the holder of the contract or agreement for the cost of maintaining, repairing, or replacing tangible personal property." § 212.0505(3), Fla. Stat. The evidence established that the maintenance services provided by Petitioner do not fall within this statutory definition. Petitioner's customers purchased maintenance

services from Petitioner at the time they needed or desired such services, and no indemnification for those services was provided. Moreover, rule 12A-1.105(3) contemplates that service warranties can be cancelled, whereas the maintenance services provided by Petitioner were purchased at the time desired; were complete upon purchase; and could not be cancelled. Since the maintenance services provided by Petitioner were not "service warranties," DOR failed to demonstrate that it has a factual or legal basis to impose a tax liability for such services.

56. As to the Department's concern about unreported sales based upon the apparent discrepancies in Petitioner's state and federal filings, the explanation provided by Petitioner's accountant for those discrepancies is credible and is accepted. Conversely, the Department's speculation that the discrepancy in income reported on Petitioner's federal tax returns and state Forms 1120S represent unreported sales, was not established by credible evidence. Rather, the evidence established that Petitioner did not underreport any of its sales, and in fact, paid taxes on all sales even if it did not ultimately receive full payment.

57. The Department did not establish that Petitioner failed to pay taxes on any of its fixed assets used in the business, and accordingly, Petitioner is not liable for additional taxes within this category.

58. Section 213.34, Florida Statutes, provides in relevant part:

> (4) Notwithstanding the provisions of section 215.26, the department shall offset the overpayment of any tax during an audit period against a deficiency of any tax, penalty, or interest determined to be due during the same audit period.

59. Petitioner's position that it is entitled to an offset of its tax liability against overpayments made is supported by the decision in Dep't of Rev. v. Kemper Investors Life Ins. Co., 660 So. 2d 1124, at 1129-1130 (Fla. 1st DCA 1995), in which the court ruled as follows:

> Here, although there was no audit of an alleged overpayment of insurance premium taxes in the audit period under review, we are of the view that this omission works against the Department, rather than against the taxpayer. By reference to section 215.26, the language of section 213.34(4) appears to place a responsibility upon the state, through its departments and officials, correctly and timely to determine the tax burden falling upon the taxpayer, over and above its responsibilities in merely responding to claims for a refund. We view these amendments as remedial legislation, and therefore applicable to the resolution of the case before us. (citations omitted)
>
> As shown above, section 213.34 specifically states that the Department shall offset the overpayment of any tax during an audit period against a deficiency of any tax determined to be due during the same audit period.

60. Petitioner is liable for a tax underpayment in the amount of $315.90 for failure to document one tax exempt sale. However, because this deficiency is less than its tax overpayments, the assessment should be voided.

RECOMMENDATION

Based upon the forgoing findings of fact and conclusions of law, it is recommended that the Department of Revenue issue a final order dismissing the Notice of Proposed Assessment dated April 6, 2010.

DONE AND ENTERED this 29th day of June, 2011, in Tallahassee, Leon County, Florida.

W. DAVID WATKINS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of June, 2011.

ENDNOTES

[1/] PGM is the Project Group Manager, also referred to as the tax audit supervisor.

[2] The Case Activity Report for the Reiser audit reflects that the first contact between Auditor Krueger and Petitioner's representatives was a conversation on May 19, 2009.

[3] Whereas under Internal Revenue Service regulations the payment of deposits toward the purchase of equipment was reported by Petitioner as income immediately upon its receipt.

[4] As succinctly explained in a footnote to Petitioner's accountant's reconciliation statement for 2009 (Petitioner Ex. 2):

> Differences between recorded income and sales reported on the FL sales tax returns are a result of timing differences due to invoice closing dates; The taxpayer reports income on Form 1120S on the cash basis of accounting; therefore, accounts receivable at year end would not be reported on Form 1120S until job is completed and invoice is paid.

[5] Petitioner established the amount of its overpayment for the period March, 2006, until the business closed in September, 2009, while the audit period was March, 2006, through February 28, 2009. Should the Department determine in its Final Order that Petitioner is not entitled to the full amount of the offset because a portion of the overpayments accrued after the audit period, Petitioner could pursue a refund of those overpayments pursuant to section 215.26(2).

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.