

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF REVENUE,)
)
 Petitioner,)
)
 vs.)
) Case No. 10-10702
 FOUR FRAN CORPORATION,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on February 21, 2011, by video teleconference between West Palm Beach and Tallahassee, Florida, before Administrative Law Judge Claude B. Arrington of the Division of Administrative Hearings (DOAH).

APPEARANCES

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

For Respondent: No appearance.

STATEMENT OF THE ISSUES

Whether Respondent committed the violations alleged in the "Administrative Complaint for Revocation of Certificate of Registration" (Administrative Complaint) filed with DOAH on April 20, 2009, and, if so, the action that should be taken.

PRELIMINARY STATEMENT

The Department of Revenue (Petitioner) seeks to permanently revoke the certificate of registration held by Four Fran Corporation (Respondent) for failure to pay sales and use taxes in the amounts and for the periods set forth in the Findings of Fact section of this Recommended Order.

Petitioner filed its Administrative Complaint against Respondent on April 20, 2009, where it was assigned DOAH Case No. 09-2124. On July 24, 2009, Petitioner filed its "Unopposed Motion to Close the Division's File, Without Prejudice to Reopen at a Later Date". On July 27, 2009, the undersigned granted the motion and relinquished jurisdiction of the matter to Petitioner. On December 16, 2010, the Petitioner filed its "Motion to Reopen Division File", which the undersigned granted the following day. Thereafter a Notice of Hearing by Video Teleconference and a Prehearing Order were entered and mailed to Petitioner's counsel and to Respondent's representative.

At the formal hearing, Petitioner presented the testimony of Anthony Martino (an investigator employed by Petitioner), and Erika Dummery (a Revenue Administrator II employed by Petitioner). Petitioner offered 11 sequentially-numbered exhibits, each of which was admitted into evidence.

As reflected above, there was no appearance on behalf of Respondent.

No transcript has been filed. Petitioner timely filed its Proposed Recommended Order, which has been duly considered by the undersigned in the preparation of this Recommended Order. Respondent did not file a proposed recommended order.

Unless otherwise noted, all statutory references are to Florida Statutes (2010).

FINDINGS OF FACT

1. Petitioner is the agency of the State of Florida responsible for administering the revenue laws of the State of Florida, including the imposition and collection of the state's sales and use taxes pursuant to chapter 212, Florida Statutes.

2. Respondent is an active for-profit corporation with its principal address at 8461 Lake Worth Road, #189, Lake Worth, Florida. Respondent is a "dealer" as that term is defined by section 212.06(2), and holds certificate of registration number 16-8014804285-5. Respondent operates a restaurant in Broward County, Florida.

3. Respondent's Registered Agent is Michael Letts, whose address is 1166 North State Road #7, Lauderhill, Florida 33313.

WARRANT 1000000100712

4. Petitioner audited Respondent for payment of sales and use taxes for the period June 1, 2004 through May 31, 2007. Petitioner assigned the number 200031264 to that audit.

5. As a result of audit number 200031264, Petitioner issued to Respondent a Notice of Proposed Assessment on May 28, 2008, that assessed Respondent \$50,326.67 in tax; \$7,549.01 in penalty; and \$13,540.49 in interest as of May 28, 2008, for a total of \$71,416.17.

6. The assessment became final on July 28, 2008.

7. Petitioner issued tax warrant numbered 1000000100712, and recorded the warrant in the public records of Broward County, Florida, on November 24, 2008. The total of the warrant, which included an updated interest amount and a \$20.00 filing fee, was \$73,483.72.

8. Interest continues to accrue until the tax is paid in full. As of February 15, 2011, the total sum of \$80,634.81 remained unpaid as a result of the assessment, the continued accrual of interest thereon, and the cost of the filing fee.¹

RETURNS WITHOUT REMITTANCES

9. Respondent filed with Petitioner sales and use tax returns without remitting the taxes due with the returns for the months of August - December 2008 and January - February 2009. Respondent failed to remit to Petitioner \$6,953.36 in sales and use taxes for those months. For that failure, Petitioner assessed Respondent with taxes in the amount of \$6,953.36; a penalty in the amount of \$505.98; interest as of March 17, 2009, in the amount of \$169.45, and a collection fee in the amount of

\$80.00. That assessment, which totaled \$7,708.79, remained unpaid at the time of the formal hearing. Interest continues to accrue until the tax is paid in full.

PROCEDURAL COMPLIANCE

10. Petitioner made efforts to negotiate a Compliance Agreement with Respondent and met with a representative of the Respondent. Those efforts were unsuccessful.

11. Respondent has failed to remit payment for the tax, penalty, interest, and fees due and owing to Petitioner pursuant to chapter 212.

12. Petitioner established that it complied with all applicable procedural requirements prior to filing the Administrative Complaint with DOAH.

CONCLUSIONS OF LAW

13. DOAH has jurisdiction over the subject matter of and the parties to this proceeding pursuant to sections 120.569, 120.57(1), and 212.18, Florida Statutes.

14. Petitioner has the burden of proving by clear and convincing evidence the allegations against Respondent. See Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Evans Packing Co. v. Dep't of Agric. & Consumer Servs., 550 So. 2d 112 (Fla. 1st DCA 1989); and Inquiry Concerning a Judge, 645 So. 2d 398 (Fla. 1994). The following statement has been repeatedly cited in discussions of the clear and convincing evidence standard:

Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the evidence must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact the firm belief of (sic) conviction, without hesitancy, as to the truth of the allegations sought to be established. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

15. Section 212.06(2) defines the term "dealer."

Respondent, a for-profit corporation operating a restaurant, is a dealer within the meaning of that definition.

16. Section 212.15(1) requires that dealers collect and remit taxes imposed by chapter 212 on a monthly basis.

17. In accordance with section 212.15, the taxes imposed pursuant to chapter 212 become state funds at the moment of collection, and the intentional failure to remit those taxes constitutes a theft of state funds.

18. Pursuant to section 212.18(3)(a), Respondent is required to file an application for a certificate of registration and pay a nominal fee. The application must include "the names of the persons who have interests in such business and their residences, the address of the business, and such other data as the department may reasonably require."

19. Pursuant to section 212.18(3)(b), except for circumstances inapplicable to this proceeding, "no person shall

engage in business as a dealer . . . without first having obtained such a certificate or after such certificate has been cancelled"

20. Section 212.18(3)(d) provides as follows:

(d) The department may revoke any dealer's certificate of registration when the dealer fails to comply with this chapter. Prior to revocation of a dealer's certificate of registration, the department must schedule an informal conference at which the dealer may present evidence regarding the department's intended revocation or enter into a compliance agreement with the department. The department must notify the dealer of its intended action and the time, place, and date of the scheduled informal conference by written notification sent by United States mail to the dealer's last known address of record furnished by the dealer on a form prescribed by the department. The dealer is required to attend the informal conference and present evidence refuting the department's intended revocation or enter into a compliance agreement with the department which resolves the dealer's failure to comply with this chapter. The department shall issue an administrative complaint under s. 120.60 if the dealer fails to attend the department's informal conference, fails to enter into a compliance agreement with the department resolving the dealer's noncompliance with this chapter, or fails to comply with the executed compliance agreement.

21. Petitioner has complied with the foregoing procedures.

22. Petitioner established by clear and convincing evidence that Respondent has repeatedly failed to comply with the provisions of chapter 212.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Revenue enter a final order that revokes Respondent's certificate of registration.

DONE AND ENTERED this 24th day of March, 2011, in Tallahassee, Leon County, Florida.



CLAUDE B. ARRINGTON
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of March, 2011.

ENDNOTE

¹ Petitioner has filed additional tax warrants against Respondent for its failure to pay sales tax for periods that predated the filing of the Administrative Complaint. Except for tax warrant numbered 1000000100712, the other tax warrants for the periods that predated the Administrative Complaint have been satisfied. In addition to tax warrant numbered 1000000100712, two tax warrants remained unsatisfied as of the date of the formal hearing. The two other tax warrants were for taxes that were due subsequent to April 20, 2009, the date Petitioner filed its Administrative Complaint with DOAH. While Petitioner established that as of February 15, 2011, the total amount Respondent owed for the three outstanding tax warrants was \$102,269.94. Petitioner did not move to file an amended

administrative complaint to include unpaid taxes for periods after the date Petitioner filed the Administrative Complaint with DOAH. The undersigned has not based any conclusions or recommendations on any unpaid taxes for periods subsequent to the filing of the Administrative Complaint.

COPIES FURNISHED:

Marshall Stranburg, General Counsel
Department of Revenue
The Carlton Building, Room 204
501 South Calhoun Street
Post Office Box 6668
Tallahassee, Florida 32314-6668

Lisa Vickers, Executive Director
Department of Revenue
The Carlton Building, Room 104
501 South Calhoun Street
Tallahassee, Florida 32399-0100

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

Robert R. Parker, Jr., Esquire
195 Morton Walk Drive
Alpharetta, Georgia 30022

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.