

STATE OF FLORIDA
DEPARTMENT OF REVENUE

DEVER, INC.,
Petitioner,

vs.

DEPARTMENT OF REVENUE,
Respondent.

DOR 2011-005 – FOF
FILED
Department of Revenue – Agency Clerk
Date Filed: *October 26, 2011*
By: *April Warner*
DOAH CASE NO. 11-2801

FINAL ORDER

This cause came before the State of Florida, Department of Revenue ("Department"), for the purpose of issuing a final order.

FINDINGS OF FACT

1. After an audit, the Department issued a Notice of Proposed Assessment ("NOPA") to Dever, Inc. ("Dever") on April 7, 2009, finding Dever liable for additional documentary stamp taxes, plus interest.
2. Dever informally protested the Department's NOPA as permitted by Department rules, and the Department issued a Notice of Decision on March 25, 2010, and, subsequently, a Notice of Reconsideration on July 23, 2010. The Notice of Reconsideration set forth the Department's final position regarding the documentary stamp taxes assessed against Dever.

3. The Notice of Reconsideration included a section titled "Taxpayer Appeal Rights," which explained that the Notice of Reconsideration constituted the final decision of the department, prior to court action or administrative proceedings, and that, pursuant to Section 72.011, *Florida Statutes*, no court action or administrative proceeding could be brought to contest the assessment after sixty (60) days from the date of the assessment. This section further stated, in regard to any request for administrative hearing,

Pursuant to Sections 72.011, 120.569, 120.57, and 120.80(14), F.S., and Rule Chapter 12-6, F.A.C., you may contest the assessment in an administrative forum by filing a petition for a Chapter 120 administrative hearing with the Department of Revenue, Office of General Counsel, Post Office Box 6668, Tallahassee, FL 32314-6668. THE PETITION MUST BE RECEIVED BY THE DEPARTMENT WITHIN SIXTY (60) DAYS OF THE DATE OF THIS NOTICE OF RECONSIDERATION. . . . The requirements of Section 72.011(2) and (3)(a), F.S., are jurisdictional for any action contesting an assessment or refund denial under Chapter 120, F.S.

See *id.* at 5. (capitalization in original).

4. Dever did not file a petition or court action within 60 days of the July 23, 2010, Notice of Reconsideration, to contest the tax assessment. On or about January 18, 2011, the Department issued a Notice of Intent to Levy ("Intent to Levy") on certain bank accounts held by Dever.

5. On or about January 21, 2011, Dever filed a one-page letter with the Department stating that it was "a petition/request for an administrative hearing." This petition was dismissed, with leave to amend, for failure to comply with Chapter 120, *Florida Statutes*, and Rule 28-106.201, *Florida Administrative Code*.

6. On March 23, 2011, Dever filed its "Amended Petition For Reconsideration" ("Petition"), which resulted in the instant proceeding. The Petition, however, did not dispute any material facts regarding the Department's Intent to Levy. Neither did the Petition provide any legal basis to contest the levy. Instead, the Petition sought to challenge the underlying basis for the assessment of the documentary stamp taxes, as set forth in the Notice of Reconsideration.

7. The Department, pursuant to Rule 28-106.204, Florida Administrative Code, moved for entry of an order relinquishing jurisdiction back to the Department for entry of a final order of dismissal. The Department asserted that the Division was without jurisdiction over the matter. Dever did not file a response in opposition. The Division entered an order on August 29, 2011, granting the Department's Motion to Dismiss, and it relinquished jurisdiction back to the Department.

8. Dever did not file any exceptions or otherwise challenge the order of the Division.

CONCLUSIONS OF LAW

1. A party may challenge the subject-matter jurisdiction of the tribunal at any stage of the proceedings. See *Pro-Art Dental Lab, Inc. v. V-Strategic Group, LLC*, 986 So. 2d 1244, 1251-52 (Fla. 2008).

2. The Department properly moved for entry of an order relinquishing jurisdiction to the Department for entry of a final order dismissing the Petition. See, e.g., Rule 28-106.204, Florida Administrative Code

3. Section 72.011, Florida Statutes, addresses the jurisdiction of the Division to hear petitions challenging certain tax matters, including assessments of documentary stamp tax liability under Chapter 201, Florida Statutes. Section 72.011, Florida Statutes, provides, in pertinent part:

72.011 Jurisdiction of circuit courts in specific tax matters; administrative hearings and appeals; *time for commencing action*; parties; deposits.—

(1)(a) A taxpayer may contest the legality of any assessment or denial of refund of tax, fee, surcharge, permit, interest, or penalty provided for under . . . chapter 201 . . . by filing an action in circuit court; or, alternatively, *the taxpayer may file a petition under the applicable provisions of chapter 120* . . .

* * *

(2)(a) An action *may not be brought* to contest an assessment of any tax, interest, or penalty assessed under a section or chapter specified in subsection (1) *more than 60 days after the date the assessment becomes final*.

(5) The requirements of subsections (1), (2), and (3) *are jurisdictional*.

(emphasis supplied).

4. Section 72.011(5), Florida Statutes, expressly makes a timely filed petition a jurisdictional prerequisite. Accordingly, this case is distinguishable from those *non-tax* cases that have generally held that the late filing of a petition for an administrative hearing is not a jurisdictional defect. See, e.g., *Patz v. Department of Health*, 864 So. 2d 79, 81 (Fla. 3d DCA 2003). Dever did not timely challenge the assessment as set forth in Section 72.11(2)(a), Florida Statutes, even though it was advised of the jurisdictional time limit in the Notice of Reconsideration. Accordingly, the Division had no jurisdiction to hear a challenge to the underlying assessment.

5. Moreover, because Dever failed to contest the underlying assessment within 60 days, the Notice of Reconsideration became final and the right to administrative review has been waived. See § 72.011, Fla. Stat. (2010); *Klein v. Department of Educ.*, 908 So. 2d 1097, 1098 (Fla. 1st DCA 2005) (holding petitioner who failed to file petition timely must be deemed to have waived right to administrative hearing); *Patz v. Department of Health*, 864 So. 2d 79 (Fla. 3d DCA 2003) (upholding default final order entered by Florida Board of Medicine when petitioner untimely filed a request for administrative hearing).

6. The only issue which the Division might properly have considered were disputed facts regarding the issuance of the Intent to Levy.

7. Dever's Petition did not contest the Intent to Levy, however, on any grounds other than the underlying basis for the tax assessment. As this underlying determination has already become final agency action several months ago, Dever cannot contest it now when the Department has begun to take collection actions.

8. The Department properly moved for entry of an order relinquishing jurisdiction to the Department for entry of a final order dismissing the Petition. Rule 28-106.204, Florida Administrative Code

9. There are no genuine issues of material fact at issue in this proceeding. Neither has petitioner raised any legal basis for finding any error or insufficiency in the levy. Accordingly, the Division properly dismissed the petition and relinquished jurisdiction relinquished to the Department for entry of a final order of dismissal.

DETERMINATION

Accordingly, it is ORDERED:

That Respondent's Petition is dismissed with prejudice.

ENTERED in Tallahassee, Leon County, Florida, this 26th day of
October, 2011.

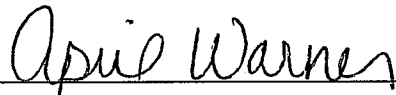
State of Florida
DEPARTMENT OF REVENUE



Lisa Vickers
Executive Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Final Order has been filed in the official records of the Florida Department of Revenue and that a true and correct copy of the Final Order has been furnished by United States mail, both regular first class and certified mail return receipt requested, to Respondent by Mitch Dever, Esquire, Mitch Dever, P.A., 1813 Thomas Drive, Panama City, Florida, 32408 this 26th day of October, 2011.



Agency Clerk

NOTICE OF RIGHT TO JUDICIAL REVIEW

Any party who is adversely affected by this final order has the right to seek judicial review of the order under section 120.68, Florida Statutes, by filing a notice of appeal under Rule 9.190 of the Florida Rules of Appellate Procedure with the Agency Clerk of the Department of Revenue in the Office of the General Counsel, Post Office Box 6668, Tallahassee, Florida 32314-6668 [FAX (850) 488-7112], **AND** by filing a **copy** of the notice of appeal accompanied by the applicable filing fees with the District Court of Appeal, First District or with the District Court of Appeal in the appellate district where the party resides. **The notice of appeal must be filed within 30 days from the date this order is filed with the clerk of the Department.**

COPIES FURNISHED :

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