

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FMG ENTERPRISES, INC.,)
)
 Petitioner,)
)
vs.) Case No. 11-3548
)
DEPARTMENT OF REVENUE,)
)
 Respondent.)

)

RECOMMENDED ORDER

This case was heard on September 26, 2011, by video teleconference at sites in Tallahassee, Florida and Jacksonville, Florida, before E. Gary Early, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Michael R. Yokan, Esquire
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For Respondent: Carrol Y. Cherry, Esquire
Assistant Attorney General
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Revenue Litigation Bureau
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STATEMENT OF THE ISSUE

Whether FMG Enterprises, Inc. must obtain and post security in the amount of \$21,250 as a condition of retaining its sales and use tax dealer's certificate of registration as alleged in

the Department's July 14, 2011 Notice of Intent to Revoke Registration.

PRELIMINARY STATEMENT

On May 18, 2011, the Department executed a Notice of Intent to Revoke Registration which required Petitioner to provide security in the amount of \$60,000 as a condition of maintaining its sales and use tax dealer's registration certificate. The Notice of Intent was based on Petitioner's failure to remit sales tax collected by Petitioner in connection with the operation of its business in March, 2011. The \$60,000 figure was calculated by multiplying the Department's estimated collections of \$5,000 per month times twelve months.

On June 13, 2011, Petitioner filed a Request for Formal Administrative Hearing to contest the amount of the security requested. An informal conference was held on June 21, 2011, at which time the Department was advised that the actual opening day of the Petitioner's business was April 7, 2011. As a result of the information received by the Department at the time of the informal conference, it was determined that estimated tax liability, based on returns for April and May, 2011, was in the range of \$1,500 to \$1,800 per month. Based on the new information, the Department issued an amended Notice of Intent to Revoke Registration in which the Department modified the

amount of the security to be provided to \$21,250. The amended Notice of Intent was issued on July 14, 2011.

On July 21, 2011, the Department transmitted Petitioner's Request for Formal Administrative Hearing to the Division of Administrative Hearings. Although Petitioner did not file an amended petition, the Request for Formal Administrative Hearing is deemed to relate to the Department's July 14, 2011 amended Notice of Intent to Revoke Registration.

Although this case is styled as FMG Enterprises, Inc. v. Department of Revenue, as a case in which the Department is seeking sanctions against FMG Enterprises, Inc.'s sales and use tax dealer's registration certificate, the burden of proof is on the Department - despite its designation as the Respondent - to prove the facts necessary to support the relief sought. See Fla. Admin. Code R. 28-106.2015.

The final hearing was scheduled for September 26, 2011 by video hearing in Tallahassee, Florida and Jacksonville, Florida. The hearing was held as scheduled. At the commencement of the hearing, the Department moved to have two sets of requests for admissions, served on August 18, 2011, deemed admitted due to Petitioner's failure to timely answer. There having been no objections to the admissions, and the time for filing responses having passed, the Respondent's First Requests for Admission,

Nos. 1-13 and Respondent's Second Requests for Admission, Nos. 1-2 were accepted as having been admitted.

Petitioner presented no witnesses or exhibits in its case in chief. Respondent presented the testimony of Alan Encinosa, a Revenue Specialist in the Department's Jacksonville service center, and Blake Hartland, the Service Center Manager in the Department's Jacksonville service center. Respondent offered Respondent's Exhibits 1-9, which were admitted into evidence without objection.

The parties were granted ten days within which to file proposed recommended orders. The Department timely filed a Proposed Recommended Order, which has been duly considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Respondent is the agency of the state of Florida charged with the duty to enforce the collection of taxes imposed pursuant to chapter 212, Florida Statutes, to issue warrants for the collection of taxes, interest, and penalties and, where necessary, to require a cash deposit, bond, or other security, as a condition to a person obtaining or retaining a dealer's certificate of registration under chapter 212.

2. Petitioner is a Florida corporation with its principal and mailing address at 9726 Touchton Road, Suite 301, Jacksonville, Florida 32246. At all times material to this

case, Petitioner operated a restaurant and club known as Mojitos Bar and Grill at its principal address. Petitioner is a "dealer" as defined in section 212.06(2), Florida Statutes.

3. Chapter 212 requires specified persons conducting business within the state to register with the Department and to obtain a certificate of registration for purposes of tax collection.

4. Petitioner made application for and received a dealer's certificate of registration, No. 26-8015498892-8, for the operation of Mojitos Bar and Grill. The application indicated that the business was to open in March 2011.

5. Mojitos Bar and Grill did not open for business until April 7, 2011.

6. As a dealer, the Petitioner was required to collect sales and use taxes from patrons and customers of Mojitos Bar and Grill, and to submit monthly tax returns and collected taxes to the Department. Sales and use taxes for any given month are due on the first day of the succeeding month, and must be paid to the Department on or before the 20th day of that succeeding month.

7. Petitioner did not file a Sales and Use Tax Return for March 2011. Based on the March 2011 opening date referenced in the application, the Department issued its May 18, 2011 Notice of Intent to Revoke Registration and a Warrant demanding payment

in the amount of \$5,046.85, which represented the estimated tax liability for March 2011, in the amount of \$5,000.00, plus interest and fees.

8. The \$5,000.00 monthly tax liability estimate was calculated using an algorithm developed by SAP, a German software company. The algorithm produced the estimate based on the location and type of the business and surrounding businesses. Based on that figure, the Department determined that it was necessary to require Petitioner to post security in the amount of \$60,000.00, which represented the projected monthly tax estimate for one year.

9. An informal hearing was held on June 21, 2011. The Department was provided with information that the business was not open in March 2011. As a result, the Department filed a satisfaction of the warrant and release of lien in the official records of Duval County. The Department was also presented with records of tax collections for April and May of 2011.

10. Petitioner filed its Sales and Use Tax Return for April 2011, listing taxes collected for that month in the amount of \$2,107.57. The check for the April 2011 taxes was returned for insufficient funds. The April 2011 tax liability has since been paid.

11. Petitioner filed Sales and Use Tax Returns for May 2011, and paid said tax in the amount of \$1,437.91. The

check was dated June 20, 2011, but the return was filed late. Petitioner was assessed a late penalty of \$125.38, although the record contains no evidence that Petitioner had notice of the late penalty before August 15, 2011. Petitioner has not paid the late penalty assessed against it for the May, 2011 taxes.

12. Based on the April and May, 2011 sales and use tax collections, the Department amended the amount of security being required as a condition of Petitioner maintaining its sales and use tax dealer's registration certificate from \$60,000.00 to \$21,250.00. The amended Notice of Intent was issued on July 14, 2011.

13. Pursuant to notice provided in the amended Notice of Intent, an informal conference was convened on August 15, 2011. No representative of Petitioner appeared at the informal conference.

14. Although the Petitioner did not enter into a compliance agreement with the Department as a result of the August 15, 2011 informal conference, all taxes due and owing for the April 2011 and May 2011 collection periods have been paid. Thus, Petitioner has materially resolved its tax liability for those months, with the exception of non-payment of the relatively small late penalty of \$125.38. Standing alone, the facts of those two monthly payments are not sufficient grounds

to support a revocation of Petitioner's sales and use tax dealer's registration certificate.

15. The Department has required security in the amount of \$21,250.00. That equates to a monthly estimated sales tax collection of approximately \$1,770.00. The sales tax collections in April 2011 and May 2011 were for \$2,107.57 and 1,437.90, respectively. Therefore, the figure calculated by the Department is reasonable.

16. The Department generally requires that, when security is determined to be necessary, one year of estimated tax collections be posted. That length of time can be shorter based on the circumstances. Given that the first two months of Petitioner's operation as a dealer resulted in returned and late payments, and since the May 2011 late penalty remains in arrears, the Department's decision to require one year of estimated collections as security is reasonable.

17. The Department raised issues relating to allegations of late or returned payments for taxes collected in June, July, and August, 2011. However, since those issues do not form the basis for the July 14, 2011, amended Notice of Intent to Revoke Registration, and have not otherwise been pled, the undersigned has not made any findings, or formulated any conclusions regarding those issues.

18. An informal drive-by inspection of Mojitos Bar and Grill conducted on September 19, 2011 by Mr. Hartland indicated that it was no longer open for business. That status was confirmed by counsel for Petitioner.

CONCLUSIONS OF LAW

A. Jurisdiction.

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

B. Standards

20. At all times material to this case, Petitioner was a "dealer" as defined at subsection 212.06(2)(a) who was required to register with the Department, to collect sales and use taxes on behalf of the state, and to remit them to the Department on a monthly basis.

21. This matter involves two separate issues. The first issue is whether the Department may require Petitioner to post security in the amount of \$21,250 as a condition of its sales and use tax dealer's registration certificate. The second issue is whether, if Petitioner fails to post such security, its certificate may be revoked in this proceeding.

22. Section 212.14 provides in pertinent part that:

212.14 Departmental powers; hearings; distress warrants; bonds; subpoenas and subpoenas duces tecum.-

* * *

(4) In all cases where it is necessary to ensure compliance with the provisions of this chapter, the department shall require a cash deposit, bond, or other security as a condition to a person obtaining or retaining a dealer's certificate of registration under this chapter. Such bond shall be in the form and such amount as the department deems appropriate under the particular circumstances. Every person failing to produce such cash deposit, bond or other security as provided for herein shall not be entitled to obtain or retain a dealer's certificate of registration under this chapter, and the Department of Legal Affairs is hereby authorized to proceed by injunction, when so requested by the Department of Revenue, to prevent such person from doing business subject to the provisions of this chapter until such cash deposit, bond or other security is posted with the department, and any temporary injunction for this purpose may be granted by any judge or chancellor authorized by law to grant injunctions. . . .

23. Section 212.18 provides in pertinent part that:

212.18 Administration of law; registration of dealers; rules.-

* * *

(2) The department shall administer and enforce the assessment and collection of the taxes, interest, and penalties imposed by this chapter. . . .

* * *

(3) (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.

24. The Department complied with the notice requirements related to the informal conference for the April 2011 and May 2011 tax payments through its July 14, 2011 Notice of Intent to Revoke Registration.

C. The Burden and Standard of Proof.

25. The Department bears the burden of proving the specific allegations of fact that support the relief sought in the Notice of Intent to Revoke Registration by clear and

convincing evidence. § 120.57(1)(j), Fla. Stat.; Latham v. Fla. Comm'n on Ethics, 694 So. 2d 83, 87 (Fla. 1st DCA 1997); see also Dep't of Banking & Fin., Div. of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); and Pou v. Dep't of Ins. and Treasurer, 707 So. 2d 941 (Fla. 3d DCA 1998).

26. Clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). For proof to be considered

clear and convincing" . . . the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony 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 a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994) quoting, with approval, from Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)); see also In re Henson, 913 So. 2d 579, 590 (Fla. 2005). "Although this standard of proof may be met where the evidence is in conflict, it seems to preclude evidence that is ambiguous." Westinghouse Electric Corp., Inc. v. Shuler Bros., Inc., 590 So. 2d 986, 989 (Fla. 1st DCA 1991).

27. The allegations of fact set forth in the charging document are the facts upon which the revocation proceeding is predicated. Trevisani v. Dep't of Health, 908 So. 2d 1108, 1109 (Fla. 1st DCA 2005). See also Cottrill v. Dep't of Ins., 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996). In this case, the Notice of Intent to Revoke Registration was predicated on the allegation that Petitioner was "delinquent in filing [its] April 2011 Sales and Use tax return and paid it with a worthless check," and was "delinquent in filing [its] May 2011 Sales and Use tax return."

28. Petitioner's late or deficient sales tax collections for June 2011; July 2011; and August 2011 were not pled in the July 14, 2011 Notice of Intent to Revoke Registration as grounds for either the requirement that Petitioner post security as a condition of its certificate, or for revocation of Petitioner's certificate. Therefore, facts related to those months cannot form the basis for the relief sought by the Department in this case.

29. Petitioner failed to timely remit tax receipts for April and May, 2011. The tax liability was ultimately paid, although Petitioner remains in arrears for the late penalty assessed for the May 2011 payment. Based on those facts, the Department has demonstrated that a cash deposit, bond, or other security is necessary as a condition of Petitioner retaining its

sales and use tax dealer's certificate of registration, and to ensure Petitioner's compliance with chapter 212.

30. The amount of the security being requested was based on reasonable assumptions, and is an appropriate amount to ensure Petitioner's compliance with chapter 212.

31. The remedy of requiring that security be posted as a condition of Petitioner's certificate of registration having been proven, the more difficult question is whether revocation of the certificate of registration is available to the Department in this proceeding if Petitioner does not post the security ordered. The Department has argued that if Petitioner does not post the security, the final order should provide that its certificate of registration be revoked.

32. Section 212.14(4) provides that dealers who fail to provide security ordered by the Department "shall not be entitled to obtain or retain a dealer's certificate of registration." In that event, the Department of Legal Affairs is legislatively authorized to seek injunctive relief to prevent the dealer from doing business until the security is posted.

33. Section 212.18(3)(d) provides the procedure for revocation of a dealer's certificate of registration when the dealer has failed to comply with chapter 212. Prior to revocation, the Department is required to schedule an informal conference to allow the dealer to refute the facts on which the

revocation is based, or to enter into a compliance agreement with the Department. The Department properly provided notice of an informal conference as part of its July 14, 2011 Notice of Intent to Revoke Registration, but no representative of the Petitioner appeared. Section 212.18(3)(d) then provides that:

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.

The Department has not filed an administrative complaint seeking revocation of Petitioner's certificate of registration.

34. Section 212.18(3)(d) clearly requires a two-stage process leading to revocation of a dealer's certificate of registration. The first stage is the notice to the dealer of an informal conference. That notice was provided in the form of the Notice of Intent to Revoke Registration. Only after the informal conference has been held is the Department authorized to issue an administrative complaint. Therefore, the notice of its informal conferences -- in this case in the form of the Notice of Intent to Revoke Registration -- and the administrative complaint are sequential, and cannot be construed to be the same document. See, e.g., Dep't of Rev. v. Linda

Arnette, d/b/a Giff's Sub Shop, Case No. 07-4051 (Fla. DOAH Mar. 14, 2008; Final Order not available).


35. The legislative requirement that a section 120.60 administrative complaint be issued prior to revocation cannot be disregarded. Therefore, the undersigned can recommend in this proceeding that security be posted pursuant to section 212.14, but that recommendation cannot include revocation as a remedy for non-compliance until an administrative complaint is issued by the Department.

RECOMMENDATION

Upon consideration of the findings of fact and conclusions of law set forth herein, it is

RECOMMENDED that the Department of Revenue enter a final order requiring Petitioner to post security in the amount of \$21,250.00 within 30 days of the entry of the final order.

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



E. GARY EARLY
Administrative Law Judge
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Filed with the Clerk of the
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this 24th day of October, 2011.

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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.