STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SNS LAKELAND, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 11-3549
	)	
DEPARTMENT OF REVENUE,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

On September 20, 2011, a formal administrative hearing in this case was held before J. D. Parrish, a designated Administrative Law Judge (ALJ) of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Brent Hanson
B and M Business Services, Inc.
6735 Conroy Road, Suite 210
Orlando, Florida 32835

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

STATEMENT OF THE ISSUE

The issue in this case is whether SNS Lakeland, Inc. (Petitioner), collected and remitted the correct amount of sales and use tax on its operations for the audit period.

PRELIMINARY STATEMENT

The Florida Department of Revenue (Department or DOR) conducted an audit of Petitioner's business operations to verify that the amounts and types of sales and use taxes, were properly remitted for the audit period. In conjunction with the audit, DOR issued a Notice of Intent to Audit Books and Records, a Pre-Audit and Electronic Data Survey, a Notice of Proposed Assessment, an Addendum to Notice of Proposed Assessment, and a Remittance Coupon. Petitioner timely challenged the assessment.

The Proposed Assessment dated March 30, 2011, contends Petitioner owes $21,874.26, as unpaid taxes, a penalty in the amount of $1,093.71, interest on the unpaid taxes in the amount of $4677.82, for a total deficiency in the amount of $27,645.79. Petitioner maintains that the margin of profit utilized by the Department incorrectly calculated the tax owed. Petitioner argues that its mark-up on products was substantially less than claimed by DOR.

DOR forwarded the matter to the DOAH for formal proceedings on July 21, 2011. The case was scheduled for hearing and all parties were afforded notice.

At the hearing, DOR presented the testimony of Annette Lopez, tax auditor III, employed by the Department and the person responsible for conducting the audit at issue in this proceeding. The Department's Exhibits 1 through 12 were

admitted into evidence. Mohamad Mustafa, employee, and Brent Hanson, accountant, testified on behalf of Petitioner. A transcript of the proceeding has not been filed. The parties filed proposed orders that have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. DOR is the state agency charged with the responsibility of administering and enforcing the tax laws of the state of Florida. In conjunction with that duty, DOR performs audits of business entities conducting sales and use transactions.

2. At all times material to the issue of this case, Petitioner conducted business as a convenience store located at 811 East Palmetto Street, Lakeland, Florida.

3. Petitioner was obligated to collect and remit sales and use tax in connection with the activities of its business enterprise. Petitioner's Federal Identification Number is 26-0412370.

4. Petitioner is authorized to conduct business within the state and its certificate of registration number is 63-8013863272-3.

5. In order to properly perform its audit responsibilities, DOR requires that businesses maintain and present business records to support the collection of sales and use taxes.

6. In this case, DOR notified Petitioner that it intended to audit the business operations for the audit period, June 1, 2007, through September 30, 2009.

7. After the appropriate pre-audit notice and exchange of information, DOR examined Petitioner's financial records. Since Petitioner did not maintain register tapes (that would track sales information most accurately), the Department examined all records that were available: financial statements, federal and state tax returns, purchase invoices/receipts, bank records, and register tapes that were available from outside the audit period.

8. Petitioner's reported tax payments with the amounts and types of taxes that it remitted should have been supported by the records it maintained. Theoretically, the sums remitted to the Department should match the records of the business entity. In this case, the amount remitted by Petitioner could not be reconciled with the business records maintained by the business entity.

9. As a result, the auditor determined the sales tax due based upon the best information available. First, the auditor looked at the actual register tapes for the period November 10, 2010, through November 29, 2010 (sample tapes). Had Petitioner kept its sales receipts, the actual receipts for the audit period would have been used. Nevertheless, the sample tapes

were used to estimate (based upon the actual business history of the company) the types and volumes of sales typically made at the store.

10. Secondly, in order to determine the mark-up on the sales, the auditor used Petitioner's purchase invoices, worksheets, profit and loss statements, and federal and state tax returns. In this regard, the auditor could compare the inventory coming in to the store with the reported results of the sales.

11. Third, the auditor determined what percentage of the sales typically would be considered exempt from tax at the time of acquisition, but then re-sold at a marked-up price for a taxable event. Petitioner argued that 70 percent of its gross sales were taxable, but had no documentary evidence to support that conclusion.

12. In contrast, after sampling records from four consecutive months, the Department calculated that the items purchased for sale at retail were approximately 78 percent taxable.

13. By multiplying the effective tax rate (calculated at 7.0816) by the amount of taxable sales, the Department computed the gross sales tax that Petitioner should have remitted to the state. That gross amount was then reduced by the taxes actually paid by Petitioner.

14. Petitioner argued that the mark-up on beer and cigarettes used by the Department was too high (thereby yielding a higher tax). DOR specifically considered information of similar convenience stores to determine an appropriate mark-up. Nevertheless, when contested by Petitioner, DOR adjusted the beer and cigarette mark-up and revised the audit findings. Petitioner presented no evidence of what the mark-up actually was during the audit period, it simply claimed the mark-up assumed by DOR was too high.

15. On March 30, 2011, DOR issued the Notice of Proposed Assessment for sales and use tax, penalty, and interest totaling $27,645.79. Interest on that amount accrues at the rate of $4.20, per day. In reaching these figures, DOR abated the penalty by 80 percent. The assessment was rendered on sales tax for sales of food, drink, beer, cigarettes, and tangible personal property. Petitioner continues to contest the assessment.

16. Throughout the audit process and, subsequently, Petitioner never presented documentation to dispute the Department's audit findings. DOR gave Petitioner every opportunity to present records that would establish that the correct amounts of sales taxes were collected and remitted. Simply stated, Petitioner did not maintain the records that might have supported its position. In the absence of such

records, the Department is entitled to use the best accounting and audit methods available to it to reconcile the monies owed the state.

CONCLUSIONS OF LAW

17. DOAH has jurisdiction over the subject matter and parties in this cause. §§ 120.569, 120.57, and 213.67, Fla. Stat. (2011). Based upon the audit period, all references are to Florida Statutes (2007), unless otherwise noted.

18. Section 120.80, provides, in pertinent part:

> (7) A taxpayer may contest the notice of intent to levy provided for under subsection (6) by filing an action in circuit court. Alternatively, the taxpayer may file a petition under the applicable provisions of chapter 120. After an action has been initiated under chapter 120, to contest the notice of intent to levy, an action relating to the same levy may not be filed by the taxpayer in circuit court, and judicial review is exclusively limited to appellate review pursuant to s. 120.68. Also, after an action has been initiated in circuit court, an action may not be brought under chapter 120.

19. Section 212.12, Florida Statutes, provides in part:

> (2)(a) When any person required hereunder to make any return or to pay any tax or fee imposed by this chapter either fails to timely file such return or fails to pay the tax or fee shown due on the return within the time required hereunder, in addition to all other penalties provided herein and by the laws of this state in respect to such taxes or fees, a specific penalty shall be added to the tax or fee in the amount of 10 percent of either the tax or fee shown on

the return that is not timely filed or any tax or fee not paid timely. The penalty may not be less than $50 for failure to timely file a tax return required by s. 212.11(1) or timely pay the tax or fee shown due on the return except as provided in s. 213.21(10). If a person fails to timely file a return required by s. 212.11(1), and to timely pay the tax or fee shown due on the return, only one penalty of 10 percent, which may not be less than $50, shall be imposed.

* * *

(3) When any dealer, or other person charged herein, fails to remit the tax, or any portion thereof, on or before the day when such tax is required by law to be paid, there shall be added to the amount due interest at the rate of 1 percent per month of the amount due from the date due until paid. Interest on the delinquent tax shall be calculated beginning on the 21st day of the month following the month for which the tax is due, except as otherwise provided in this chapter.

(4) All penalties and interest imposed by this chapter shall be payable to and collectible by the department in the same manner as if they were a part of the tax imposed. The department may settle or compromise any such interest or penalties pursuant to s. 213.21.

(5)(a) The department is authorized to audit or inspect the records and accounts of dealers defined herein, including audits or inspections of dealers who make mail order sales to the extent permitted by another state, and to correct by credit any overpayment of tax, and, in the event of a deficiency, an assessment shall be made and collected. No administrative finding of fact is necessary prior to the assessment of any tax deficiency.

(b) In the event any dealer or other person charged herein fails or refuses to make his or her records available for inspection so that no audit or examination has been made of the books and records of such dealer or person, fails or refuses to register as a dealer, fails to make a report and pay the tax as provided by this chapter, makes a grossly incorrect report or makes a report that is false or fraudulent, then, in such event, it shall be the duty of the department to make an assessment from an estimate based upon the best information then available to it for the taxable period of retail sales of such dealer, the gross proceeds from rentals, the total admissions received, amounts received from leases of tangible personal property by such dealer, or of the cost price of all articles of tangible personal property imported by the dealer for use or consumption or distribution or storage to be used or consumed in this state, or of the sales or cost price of all services the sale or use of which is taxable under this chapter, together with interest, plus penalty, if such have accrued, as the case may be. Then the department shall proceed to collect such taxes, interest, and penalty on the basis of such assessment which shall be considered prima facie correct, and the burden to show the contrary shall rest upon the dealer, seller, owner, or lessor, as the case may be.

(6)(a) The department is given the power to prescribe the records to be kept by all persons subject to taxes imposed by this chapter. It shall be the duty of every person required to make a report and pay any tax under this chapter, every person receiving rentals or license fees, and owners of places of admission, to keep and preserve suitable records of the sales, leases, rentals, license fees, admissions, or purchases, as the case may be, taxable under this chapter; such other books of

account as may be necessary to determine the amount of the tax due hereunder; and other information as may be required by the department. It shall be the duty of every such person so charged with such duty, moreover, to keep and preserve as long as required by s. 213.35, all invoices and other records of goods, wares, and merchandise; records of admissions, leases, license fees and rentals; and records of all other subjects of taxation under this chapter. All such books, invoices, and other records shall be open to examination at all reasonable hours to the department or any of its duly authorized agents.

(b) For the purpose of this subsection, if a dealer does not have adequate records of his or her retail sales or purchases, the department may, upon the basis of a test or sampling of the dealer's available records or other information relating to the sales or purchases made by such dealer for a representative period, determine the proportion that taxable retail sales bear to total retail sales or the proportion that taxable purchases bear to total purchases. This subsection does not affect the duty of the dealer to collect, or the liability of any consumer to pay, any tax imposed by or pursuant to this chapter.

(c)1. If the records of a dealer are adequate but voluminous in nature and substance, the department may sample such records and project the audit findings derived there from 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 . . .

* * *

(9) Taxes imposed by this chapter upon the privilege of the use, consumption, storage for consumption, or sale of tangible

personal property, admissions, license fees, rentals, communication services, and upon the sale or use of services as herein taxed shall be collected upon the basis of an addition of the tax imposed by this chapter to the total price of such admissions, license fees, rentals, communication or other services, or sale price of such article or articles that are purchased, sold, or leased at any one time by or to a customer or buyer; the dealer, or person charged herein, is required to pay a privilege tax in the amount of the tax imposed by this chapter on the total of his or her gross sales of tangible personal property, admissions, license fees, rentals, and communication services or to collect a tax upon the sale or use of services, and such person or dealer shall add the tax imposed by this chapter to the price, license fee, rental, or admissions, and communication or other services and collect the total sum from the purchaser, admittee, licensee, lessee, or consumer . . .

20. Section 212.13, provides, in part:

(1) For the purpose of enforcing the collection of the tax levied by this chapter, the department is hereby specifically authorized and empowered to examine at all reasonable hours the books, records, and other documents of all transportation companies, agencies, or firms that conduct their business by truck, rail, water, aircraft, or otherwise, in order to determine what dealers, or other persons charged with the duty to report or pay a tax under this chapter, are importing or are otherwise shipping in articles or tangible personal property which are liable for said tax. In the event said transportation company, agency, or firm refuses to permit such examination of its books, records, or other documents by the department as aforesaid, it is guilty of a misdemeanor of the first degree, punishable as provided in

s. 775.082 or s. 775.083. If, however, any subsequent offense involves intentional destruction of such records with an intent to evade payment of or deprive the state of any tax revenues, such subsequent offense shall be a felony of the third degree, punishable as provided in s. 775.082 or s. 775.083. The department shall have the right to proceed in any chancery court to seek a mandatory injunction or other appropriate remedy to enforce its right against the offender, as granted by this section, to require an examination of the books and records of such transportation company or carrier.

(2) Each dealer, as defined in this chapter, shall secure, maintain, and keep as long as required by s. 213.35, a complete record of tangible personal property or services received, used, sold at retail, distributed or stored, leased or rented by said dealer, together with invoices, bills of lading, gross receipts from such sales, and other pertinent records and papers as may be required by the department for the reasonable administration of this chapter; all such records which are located or maintained in this state shall be open for inspection by the department at all reasonable hours at such dealer's store, sales office, general office, warehouse, or place of business located in this state. Any dealer who maintains such books and records at a point outside this state must make such books and records available for inspection by the department where the general records are kept. Any dealer subject to the provisions of this chapter who violates these provisions is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082, or s. 775.083. If, however, any subsequent offense involves intentional destruction of such records with an intent to evade payment of or deprive the state of any tax revenues, such subsequent offense shall be a felony of the third

degree, punishable as provided in s. 775.082, or s. 775.083.

(3) For the purpose of enforcement of this chapter, every manufacturer and seller of tangible personal property or services licensed within this state is required to permit the department to examine his or her books and records at all reasonable hours, and, upon his or her refusal, the department may require him or her to permit such examination by resort to the circuit courts of this state, subject however to the right of removal of the cause to the judicial circuit wherein such person's business is located or wherein such person's books and records are kept, provided further that such person's books and records are kept within the state. When the dealer has made an allocation or attribution pursuant to the definition of sales price in s. 212.02(16), the department may prescribe by rule the books and records that must be made available during an audit of the dealer's books and records and examples of methods for determining the reasonableness thereof. Books and records kept in the regular course of business include, but are not limited to, general ledgers, price lists, cost records, customer billings, billing system reports, tariffs, and other regulatory filings and rules of regulatory authorities. Such record may be required to be made available to the department in an electronic format when so kept by the dealer. The dealer may support the allocation of charges with books and records kept in the regular course of business covering the dealer's entire service area, including territories outside this state. During an audit, the department may reasonably require production of any additional books and records found necessary to assist in its determination.

(4) For the further purpose of enforcement of this chapter, every wholesaler of tangible personal property or services

licensed within this state is required to permit the department to examine his or her books and records at all reasonable hours. He or she must also maintain such books and records as long as required by s. 213.35, in order to disclose the sales of all goods or services sold, to whom sold, and also the amount of items sold, in such form and in such manner as the department may reasonably require, so as to permit the department to determine the volume of goods or services sold by wholesalers to dealers, as defined under this chapter, and the dates and amounts of sales made. The department may require any manufacturer or wholesaler who refuses to keep such records or to permit such inspection, through the circuit courts of Florida, to submit to such inspection, subject however to the right of removal of the cause as hereinbefore provided in this section.

21. Section 213.34, provides, in part:

(1) The Department of Revenue shall have the authority to audit and examine the accounts, books, or records of all persons who are subject to a revenue law made applicable to this chapter, or otherwise placed under the control and administration of the department, for the purpose of ascertaining the correctness of any return which has been filed or payment which has been made, or for the purpose of making a return where none has been made.

(2) The department, or its duly authorized agents, may inspect such books and records necessary to ascertain a taxpayer's compliance with the revenue laws of this state, provided that the department's power to make an assessment or grant a refund has not terminated under s. 95.091(3).

(3) The department may correct by credit or refund any overpayment of tax, penalty, or interest revealed by an audit and shall make

> assessment of any deficiency in tax, penalty, or interest determined to be due.

22. In this case, DOR must show by a preponderance of evidence that the audit results and the assessment of the unpaid sales and use tax should be upheld. It has met its burden. The audit notes and the methodology of the audit support the amounts and basis for all sales and use tax not remitted by Petitioner. Contrary to Petitioner's claim, the mark-up for beer and cigarettes was not excessive.

23. Petitioner has not presented any documentation to refute the audit results. Florida tax law creates the presumption of correctness of the Department's assessment of tax, penalty, and interest. See § 212.12(5)(b). Additionally, Petitioner has not presented any credible evidence to refute the methodology used by the Department in the performance of its audit.

24. In order to set aside the findings of the audit, Petitioner should have kept records that would have accurately identified the inventory and sales made at the convenience store. Petitioner kept no records to support its claim. The conclusions reached by DOR regarding the taxable sales, presumption of percentages, and tax rate are deemed accurate. Petitioner did not present any rule or statute that could hold otherwise. Further, without information to show that Petitioner

paid sales tax on all its taxable transactions, the Department must include such transactions within the audit results. Petitioner had the duty to maintain records and make them available. Petitioner may not argue that the inadequacy of its records contradicts the audit results.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Revenue enter a final order sustaining the audit findings, and require Petitioner to remit the unpaid sales and use taxes, penalty, and interest as stated in the Department's audit findings.

DONE AND ENTERED this 9th day of November, 2011, in Tallahassee, Leon County, Florida.

J. D. PARRISH
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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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.