

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

JACKSONVILLE ENTERTAINMENT )  
COMPANY, LLC, )  
 )  
Petitioner, )  
 ) Case No. 11-4341  
vs. )  
 )  
DEPARTMENT OF REVENUE, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

A formal hearing was conducted in this case on January 26, 2012, in Jacksonville, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: No appearance

For Respondent: Carrol Y. Cherry, Esquire  
Office of the Attorney General  
The Capitol, PL-01  
Revenue Litigation Bureau  
Tallahassee, Florida 32399-1050

STATEMENT OF THE ISSUE

The issue is whether the Department of Revenue (the "Department") may revoke the Certificate of Registration issued to Petitioner for failure to post a \$10,000 cash deposit, surety bond, or irrevocable letter of credit.

PRELIMINARY STATEMENT

On May 18, 2011, the Department issued a Notice of Intent to Revoke Registration ("Notice") to Petitioner, Jacksonville Entertainment Company, LLC. The Notice stated as follows, in relevant part:

Subsection 212.14(4), Florida Statutes, requires the Department to obtain security as a condition to any person obtaining or retaining a sales & use tax dealer's certificate of registration in all instances where it is necessary to ensure compliance with the sales and use tax laws (Chapter 212, Florida Statutes). The Department has determined that you must post security for the following reason(s):

1. It is delinquent in filing its Sales and Use tax returns.

The amount of security you must provide is \$10,000. This amount was determined as follows:

1. Twelve months of estimated Sales and Use Tax due.

Accordingly, the Department is notifying you of its intent to revoke your dealer's certificate of registration unless security in the form of a cash deposit, surety bond, or irrevocable letter of credit is posted in the required amount. The Department must receive the required security on or before the date of the informal conference, set forth below.

The Notice went on to state that the informal conference would be held on June 21, 2011, that Petitioner would be allowed to present evidence on its own behalf at the conference, and

that the Notice would become final on the date of the informal conference unless Petitioner posted the required security or reached some other agreement with the Department at the informal conference.

The informal conference did not persuade the Department to forego the security requirement set forth in the Notice. On July 13, 2011, counsel for Petitioner filed with the Department a Request for Formal Administrative Hearing contesting the Department's finding that a bond was needed to guarantee tax payments and disputing the Department's \$10,000 estimate of the taxes that would be paid by Petitioner over a twelve-month period.

On August 24, 2011, the Department referred the Request for Formal Administrative Hearing to the Division of Administrative Hearings ("DOAH"). The case was initially set for hearing on October 24, 2011.

On October 21, 2011, counsel for Petitioner filed a motion requesting a continuance and leave to withdraw from further representation of Petitioner. Counsel stated that his appearance on behalf of Petitioner had been limited to filing the Request for Formal Administrative Hearing and appearing at one meeting with the Department on behalf of Petitioner. The owner of Jacksonville Entertainment Company, LLC, Bechara Richa, had notified counsel that he intended to represent the company

from that point forward. Counsel further stated that he had been out of contact with Petitioner for several months and that it was his understanding that Petitioner was no longer conducting business.

Based on counsel's representations, the undersigned entered separate orders on October 24, 2011, that continued the final hearing and allowed counsel to withdraw his representation of Petitioner in this proceeding. By order dated December 1, 2012, the hearing was rescheduled for January 26, 2012, on which date it was convened at 1:00 p.m.

No representative of Petitioner appeared at the final hearing on January 26, 2012, the commencement of which was delayed by 10 minutes to allow Petitioner every opportunity to be heard. The hearing proceeded in order to allow the Department to present its prima facie case. The hearing adjourned at approximately 1:30 p.m.

On January 30, 2012, the undersigned entered an order to show cause directing Petitioner to provide, within 10 days, reasons why the record in the case should not be closed and the recommended order entered based on the current record. Petitioner did not respond to the order to show cause. An order closing the record was entered on February 14, 2012.

At the hearing, the Department presented the testimony of Tammy Arnold, a Revenue Specialist III in the Department's

Jacksonville office, and of Blake Hartland, the Department's Service Center Manager in Jacksonville. The Department's Exhibits 1 through 5 were admitted into evidence.

No transcript of the hearing was provided. The Department timely filed a Proposed Recommended Order on February 15, 2012. Petitioner did not file a proposed recommended order.

Unless otherwise noted, all statutory references are to Florida Statutes (2011). There has been no change to the statutes cited in this Recommended Order at any time relevant to this proceeding.

#### FINDINGS OF FACT

1. The Department 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 5800 Phillips Highway, Jacksonville, Florida 32216.

3. Petitioner is a "dealer" as defined in section 212.06(2), Florida Statutes. Petitioner holds Dealer's Certificate of Registration No. 26-8015523525-2.

4. As a dealer, Petitioner was required to collect sales and use taxes from customers 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.

5. Petitioner failed to file the required sales and use tax returns for January through March 2011. In a delinquent tax warrant dated May 18, 2011, the Department assessed Petitioner estimated tax of \$3,000 for the three months in question, along with \$32.79 in interest, \$300.00 in penalties, and fees in the amount of \$20.00, for a total of \$3,352.79.

6. The Department estimated the tax due for the months of January through March 2011 based on historical data, i.e., Petitioner's previous sales and use tax returns.

7. The Department issued the Notice on May 18, 2011. The Notice was served on Petitioner on May 20, 2011.

8. The Notice required Petitioner to post a \$10,000 cash deposit, surety bond, or irrevocable letter of credit as a condition to retaining its Certificate of Registration. The Notice further advised Petitioner of an informal conference, commonly referenced as a "bond hearing," to be conducted on June 21, 2011, for the purpose of affording the Petitioner an opportunity to resolve the delinquent tax issue.

9. The Notice also stated as follows, in relevant part:

This Notice of Intent to Revoke Registration will become final on the date of the informal conference if the required security has not been posted, or an agreement is not reached at the informal conference, or you fail to attend the informal conference.

NOTICE OF RIGHTS

Should this notice become final, you have the right to request an administrative hearing, which will be conducted in accordance with section 120.57, Florida Statutes. You may be represented by counsel or other qualified representative and present written or oral evidence or statements in opposition of the Department's intended action. If a disputed fact hearing (formal hearing) is conducted pursuant to subsection 120.57(1), Florida Statutes, you may also take testimony, call or cross-examine witnesses, have subpoena duces tecum issued, and present written evidence.

\* \* \*

If you fail to timely file a request for a hearing that complies with the requirements provided above, the Department will close its file on this matter and consider this Notice its final agency action, thereby revoking your certificate of registration. . . .

10. At the bond hearing, Petitioner provided the Department with sales and use tax returns for the months of April through June 2011, but did not remit the taxes due on those returns.

11. Based on the newly filed returns, the Department issued a delinquent tax warrant dated September 29, 2011, that

assessed Petitioner tax of \$2,418.50 for the three months in question, along with \$41.81 in interest, \$335.20 in penalties, and fees in the amount of \$20.00, for a total of \$2,815.51.

12. Pursuant to the Notice of Rights set forth in the Notice, Petitioner filed a Request for Formal Administrative Hearing on July 13, 2011. There is no record evidence that the Department filed an Administrative Complaint in this case.

13. As of the date of the hearing, Petitioner had not posted with the Department a \$10,000 cash deposit, surety bond, or irrevocable letter of credit.

14. Based on the available information, the Department's requirement of a \$10,000 cash deposit, surety bond, or irrevocable letter of credit as a condition to Petitioner's retaining its certificate of registration was reasonable.

#### CONCLUSIONS OF LAW

15. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

16. 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).

17. In Evans Packing Co. v. Dep't of Agric. & Consumer  
Servs., 550 So. 2d 112, 116, n. 5 (Fla. 1st DCA 1989), the Court  
defined clear and convincing evidence as follows:

[C]lear 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  
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).

18. Judge Sharp, in her dissenting opinion in Walker v.  
Fla. Dep't of Bus. & Prof'l Reg., 705 So. 2d 652, 655 (Fla. 5th  
DCA 1998) (Sharp, J., dissenting), reviewed recent  
pronouncements on clear and convincing evidence:

Clear and convincing evidence requires more  
proof than preponderance of evidence, but  
less than beyond a reasonable doubt. In re  
Inquiry Concerning a Judge re Graziano, 696  
So. 2d 744 (Fla. 1997). It is an  
intermediate level of proof that entails  
both qualitative and quantative [sic]  
elements. In re Adoption of Baby E.A.W.,  
658 So. 2d 961, 967 (Fla. 1995), cert.  
denied, 516 U.S. 1051, 116 S. Ct. 719, 133  
L.Ed.2d 672 (1996). The sum total of  
evidence must be sufficient to convince the  
trier of fact without any hesitancy. Id.

It must produce in the mind of the fact finder a firm belief or conviction as to the truth of the allegations sought to be established. Inquiry Concerning Davey, 645 So. 2d 398, 404 (Fla. 1994).

19. Every person desiring to engage in or conduct business in this state as a "dealer" must be licensed by the Department pursuant to section 212.18, Florida Statutes, and Florida Administrative Code Rule 12A-1.060. At all times relevant 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.

20. Section 212.18, Florida Statutes, authorizes the Department to issue a dealer's certificate of registration and to revoke such registration upon the failure of a dealer to comply with the requirements of chapter 212, Florida Statutes.

21. The sole relief sought by the Department in this proceeding is the revocation of Petitioner's Dealer's Certificate of Registration. The process by which such revocation may be accomplished is detailed in section 212.18(3)(d), Florida Statutes:

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. (emphasis added).

22. The evidence presented at the hearing established that the Department followed each step provided by section 212.18(3)(d) until the point at which the informal conference failed to result in a compliance agreement with Petitioner. At that point, it appears that both the Department and Petitioner acted in accordance with the "Notice of Rights" that the Department included in the Notice of Intent to Revoke Registration, set forth in relevant part at Finding of Fact 9, supra. Petitioner submitted to the Department a Request for Formal Administrative Hearing, which the Department forwarded to

DOAH. There is no record evidence that the Department ever filed an Administrative Complaint against Petitioner.

23. In FMG Enterprises, Inc. v. Dep't of Rev., Case No. 11-3548 (Fla. DOAH Oct. 24, 2011; Fla. Dep't of Rev. Dec. 27, 2011), Administrative Law Judge E. Gary Early arrived at the following conclusions, adopted herein:

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. . . [The recommended order] cannot include revocation as a remedy for non-compliance until an administrative complaint is issued by the Department.

24. Because of this procedural deficiency, it is concluded that the Department has not proven its entitlement to revoke Petitioner's certificate of registration by clear and convincing evidence.

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 declines to revoke Dealer's Certificate of Registration No. 26-8015523525-2 held by Jacksonville Entertainment Company, LLC, until such time as the Department fully complies with the requirements of subsection 212.18(3)(d), Florida Statutes by issuing an Administrative Complaint.

DONE AND ENTERED this 19th day of March, 2012, in Tallahassee, Leon County, Florida.

*Lawrence P. Stevenson*

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LAWRENCE P. STEVENSON  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 19th day of March, 2012.

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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