

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

ASTRID SARMENTERO AS PRESIDENT )  
FOR BELLA DONNA COUTURE, INC., )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 11-4681  
 )  
DEPARTMENT OF REVENUE, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case pursuant to sections 120.569 and 120.57(1), Florida Statutes (2011),<sup>1/</sup> before Cathy M. Sellers, an Administrative Law Judge of the Division of Administrative Hearings, on November 22, 2011, April 25, 2012, and July 30, 2012, by video teleconference at sites in Miami and Tallahassee, Florida.

APPEARANCES

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

For Respondent: Carlos M. Samlut  
Samlut & Company  
Mezzanine - Suite 200  
550 Biltmore Way  
Coral Gables, Florida 33134

STATEMENT OF THE ISSUE

Whether Petitioner, as President of Bella Donna Couture, Inc., is liable for a penalty equal to twice the total amount of the sales and use tax owed by that entity to the State of Florida.

PRELIMINARY STATEMENT

By agency action letter dated June 20, 2011, Respondent, Florida Department of Revenue, notified Petitioner, Astrid Sarmentero, that it was assessing a penalty in the amount of \$18,345.14 against her, as the President of Bella Donna Couture, Inc., for that entity's failure to remit sales taxes to the State of Florida. Petitioner timely requested a hearing pursuant to sections 120.569 and 120.57(1) and the matter was referred to the Division of Administrative Hearings for assignment of an Administrative Law Judge and conduct of the hearing.

Mr. Carlos M. Samlut, Certified Public Accountant, was accepted as a qualified representative for Petitioner pursuant to Florida Administrative Code Rule 28-106.106.

The final hearing was held on November 22, 2011, February 8, 2012, and July 30, 2011. Petitioner presented the testimony of Astrid Sarmentero, Sonia Kings, and Genevieve Cockfield, and offered Petitioner's Exhibits 1 through 22 for admission into evidence. Petitioner's Exhibits 2 through 12, 15, 16, 18 and 19 were admitted into evidence without objection; Petitioner's

Exhibits 1, 13, 14, 17, and 20 through 22 were admitted into evidence over objection. Respondent presented the testimony of Barbara Chin and Mercedes Fajardo, and offered Respondent's Exhibits 1 through 17 for admission into evidence. Respondent's Exhibits 1 through 5, 7, and 9 through 17 were admitted into evidence without objection; Respondent's Exhibits 6 and 8 were admitted into evidence over objection. Additionally, Respondent's First Requests for Admission were admitted into evidence pursuant to Florida Rule of Civil Procedure 1.370(a).<sup>2/</sup>

Volumes I and II of the four-volume Transcript were filed on May 15, 2012, and May 22, 2012, respectively, and volumes III and IV were filed on August 16, 2012. The parties were given until August 27, 2012, to file Proposed Recommended Orders. Petitioner requested an extension of time to file its Proposed Recommended Order due to circumstances beyond its control (i.e., the impacts of Tropical Storm Isaac) so an extension of time was granted until September 4, 2012. The parties timely filed their Proposed Recommended Orders on September 4, 2012; both were considered in preparing this Recommended Order.

#### FINDINGS OF FACT

##### I. The Parties

1. Respondent is the agency charged with administering the revenue laws of the State of Florida, including chapter 212,

which imposes and authorizes the collection of sales and use tax in Florida.

2. Petitioner was President of Bella Donna Couture, Inc. ("Taxpayer"), a women's clothing store formerly located at 5819 Sunset Drive, South Miami, Florida.

3. Taxpayer is registered with Respondent as a dealer pursuant to section 212.18 and was issued Sales and Use Tax Certificate of Registration Number 23-8012167329-8.

## II. Events Giving Rise to the Notice of Assessment

4. Taxpayer did not remit sales tax for November 2003, January 2004, June 2005, September 2005, January 2006, July 2006, September 2006, and November 2006, and so was delinquent in its statutory obligation to remit sales tax for these reporting periods.

5. To collect these outstanding tax liabilities, on January 17, 2007, Respondent issued Warrant No. 40490. The warrant stated that Taxpayer owed \$11,471.59 in taxes, \$2,060.00 in penalties, \$1,623.22 in interest, and a filing fee of \$20.00, for a total liability of \$15,174.81. The warrant was recorded in the public records of Miami-Dade County on January 24, 2007.

6. In an effort to compromise and resolve Taxpayer's outstanding tax liabilities, on April 25, 2008, Respondent entered into a Stipulated Time Payment Agreement ("STPA") with Taxpayer. The STPA was executed by Petitioner, as Taxpayer's

President.<sup>3/</sup> Under the STPA, Taxpayer committed to pay \$13,526.72, consisting of \$9,078.36 in taxes, \$1,220.70 in penalties, \$3,187.66 in interest, and \$40.00 in fees. The STPA established an amortization schedule under which Taxpayer would pay a specified amount per month for a 13-month period.

7. Pursuant to the STPA's terms, Taxpayer, by entering into the STPA, waived any and all rights to challenge the taxes and other liabilities assessed under the warrant giving rise to the STPA. Other key terms were that interest accrued at a rate of 12% per annum until the tax liability was paid; that Taxpayer agreed to meet each payment term on the amortization schedule; and that the STPA would become void if Taxpayer failed to follow the payment terms, file all tax returns that became due, or remit all taxes that became due and payable. The STPA further provided that Respondent was authorized to assess the responsible corporate officer a 200% penalty for failure to pay the taxes due.

8. In accordance with the STPA's terms, Taxpayer made a \$2,000 downpayment and three \$450 monthly payments, for a total payment of \$3,350.00.

9. However, Taxpayer failed to make the stipulated monthly payment due on August 25, 2008. Thus, pursuant to the STPA's terms, it became void, and all taxes, penalties, interest, and

fees owed under Warrant No. 40490 became due and payable as of that date.

10. Section 213.75(2) establishes the order of priority for applying payments toward outstanding tax and other liabilities when a warrant has been filed and recorded. Specifically, payments are applied in the following order, with any remaining amounts applied to the subsequent obligation: (1) costs of recording the warrant; (2) administrative collection processing fee; (3) accrued interest; (4) accrued penalty; and (5) taxes due.

11. Once Taxpayer breached the STPA, all payments made under the STPA were applied as payments on Warrant No. 40490 in accordance with section 213.75(2).

12. After the \$3,350.00 paid under the STPA was applied toward Warrant No. 40490, and \$434.44 was paid on the warrant from a bank levy, Taxpayer continued to owe \$9,172.57 in taxes, as well as interest and penalties from its outstanding obligations for November 2003, January 2004, June 2005, September 2005, January 2006, July 2006, September 2006, and November 2006. Pursuant to the terms of the warrant, interest on the amount of taxes due continued to accrue at a rate of 12% per annum.

13. Taxpayer subsequently failed to remit its sales tax for December 2008. In response, Respondent levied Taxpayer's

MetroBank account in the amount of \$4,000.00 on February 18, 2009. Portions of this levy were applied toward previously-issued Warrant No. 110461 and toward Notices of Liability for outstanding taxes due for the December 2008 and September 2008 sales tax collection periods.

14. In early 2009, Taxpayer and Respondent attempted to negotiate another STPA to again compromise the amount of taxes, interest, penalties, and fees that Taxpayer owed for the November 2003, January 2004, September 2005, January 2006, July 2006, September 2006, and November 2006 sales tax collection periods. However, the parties were unable to reach agreement, so Respondent continued its collection efforts.

15. In March 2011, Respondent again attempted to work with Taxpayer to resolve its outstanding tax and other liabilities. To that end, Barbara Chin, a revenue specialist with Respondent, attempted to contact Petitioner by telephone. Her telephone messages went unanswered, so on March 22, 2011, Ms. Chin sent Petitioner a Demand to Appear, informing Petitioner that an appointment had been set with Respondent for April 4, 2011, for her to discuss Taxpayer's outstanding liabilities. The Demand to Appear specifically informed Petitioner that failure to comply with the letter would result in issuance of a tax warrant and any other legal action Respondent deemed necessary to collect the outstanding taxes. Petitioner failed to appear, so

Ms. Chin made a follow-up telephone call to Petitioner, which also went unanswered.

16. Taxpayer failed to remit its sales tax or file a return for April 2011. In response, Respondent issued Warrant No. 219580, for the amount of \$1,500.00 due in taxes. The warrant was recorded in the Miami-Dade County public records on June 14, 2011.

17. Petitioner subsequently contacted Ms. Chin to discuss Taxpayer's outstanding liabilities. At this time, Petitioner informed Ms. Chin that she was going to file for bankruptcy of Taxpayer.

18. In response, Ms. Chin sent a letter to the NAFH Bank, with which Taxpayer had an account, freezing the transfer of Taxpayer's credits, debts, and personal property in the bank's control.

19. On June 6, 2011, Petitioner sent Respondent a completed Closing or Sale of Business form, dated May 30, 2011, indicating that Taxpayer's business had been closed.

20. Ms. Chin made two site visits to Taxpayer's location in or about May 2011. On her first visit, Ms. Chin discovered that a business bearing the name "Alexis Nicolette Design Studio and Boutique" was operating at this location, and that Petitioner was working there. Ms. Chin informed Petitioner that this entity needed to obtain its own sales tax number.



21. On Ms. Chin's second visit, Petitioner showed her a certificate of registration for Alexis Nicolette Design Studio and Boutique having the same sales tax number but showing a different business location.<sup>4/</sup> Ms. Chin again informed Petitioner that the owner of this entity needed to obtain a new sales tax number for the entity for the new location.

22. Ms. Chin reviewed the Articles of Incorporation for Alexis Nicolette Design Studio and Boutique; this document showed this entity's business address as being the same as Taxpayer's address.

23. Ms. Chin surmised that Petitioner was attempting to avoid Taxpayer's sales tax liabilities and obligations by operating Taxpayer's business under a new name.

24. Respondent sent Petitioner a Notice of Assessment ("NOA") dated June 20, 2011, setting forth Taxpayer's outstanding tax liabilities and notifying her that Respondent was personally assessing a penalty against her for double the amount of tax owed by the Taxpayer. The NOA included the taxes owed under Warrant Nos. 40490 and 219580, and specifically stated that the penalty being assessed was for the period from November 2003 through April 2011.

25. It is undisputed that between November 2003 and April 2011, Petitioner was the President of Taxpayer, and thus was the person having administrative control over the collection and

payment of sales tax by Taxpayer for purposes of section 213.29.

### III. Petitioner's Defenses Against the Notice of Assessment

26. The parties disagree on the amount of taxes that Taxpayer owes. Petitioner claims that Taxpayer owes approximately \$194.00 in taxes, while Respondent claims that Taxpayer owes \$9,182.60 in taxes.

27. Petitioner claims that pursuant to section 213.29(1), Respondent incorrectly applied Taxpayer's payments made under the STPA, and that all payments Taxpayer made should have been applied first toward outstanding taxes, then interest, then penalties, then toward any applicable fees. This argument is the linchpin of Petitioner's position that the assessments in the June 20, 2011, NOA are incorrect.

28. Petitioner also asserts that the April 2008 STPA is defective because it does not contain a detailed amortization schedule.

29. Petitioner further claims that subsections 95.091(2) and (3)(a)1.a. time-bar Respondent from bringing an action to collect taxes that were due before June 21, 2006.

30. Finally, Petitioner argues that under any circumstances, Respondent did not establish that she sought to willfully evade or defeat Taxpayer's tax liabilities, so she cannot be held personally liable for the penalty assessed under the NOA.

#### IV. Findings of Ultimate Fact

31. In this proceeding, Respondent has the initial burden under section 120.80(14)(b)2., to establish a prima facie case showing that an assessment was made against Taxpayer, and that the assessment was factually and legally correct. Once Respondent meets this burden, the ultimate burden of persuasion shifts to Petitioner to prove, by a preponderance of the evidence, that Respondent's assessment is incorrect, departs from the requirements of law, or is not supported by any reasonable hypothesis of legality.

32. Upon consideration of the credible and persuasive evidence in the record, it is determined that Respondent met its prima facie burden and that Petitioner failed to meet its ultimate burden of persuasion in this proceeding.

33. Petitioner's position that all payments made by Taxpayer under the STPA, as well as payments made toward other warrants, should first have been applied toward its tax liability lacks merit. That argument may have had force if warrants against Taxpayer had not been filed and recorded. However, in this case, by the time Taxpayer began making payments toward its outstanding tax liabilities, those liabilities were the subject of Warrant No. 40490 and other warrants. Once Taxpayer breached the STPA, it became void and all liabilities under Warrant No. 40490 became immediately due.

The payments under the STPA were applied to Warrant No. 40490, and other payments toward liabilities not addressed in the STPA made were applied to Warrant No. 40490 and other outstanding warrants, all in accordance with section 213.75(2). Thus, the payments were allocated first toward fees, then penalties, then interest, and, finally, taxes. Respondent established the correctness of amounts assessed, and Petitioner did not show that Respondent incorrectly applied the payments pursuant to section 213.75(2) or that the taxes and other liabilities set forth in the June 20, 2011, NOA were inaccurate.

34. Petitioner's argument that the STPA was "defective" as lacking a detailed amortization schedule also lacks merit. The STPA contained a "Stipulation Amortization Table" that established a detailed 13-month repayment schedule specifying the date on which each payment was due and the specific amount due for each payment.<sup>5/</sup>

35. The NOA is not time-barred by section 95.091(2). That statute imposes a five-year limitation period for filing an action to collect taxes if a lien to secure the payment is not provided by law. However, this proceeding was brought against Petitioner to impose penalties for willful nonpayment of Taxpayer's tax liabilities; it is not an action against Taxpayer to collect taxes. Thus, by its plain terms, section 95.091(2) does not apply to this proceeding.

36. Section 95.091(3)(a)1.a. also does not time-bar the NOA. That statute authorizes Respondent to determine and assess the amount of tax, penalty, or interest with respect to sales tax within three years after the date that the tax is due, any return with respect to such tax is due, or such return is filed. Here, Respondent filed warrants and assessments as far back as January 2003 to collect taxes owed by Taxpayer; all were filed well within any applicable three-year limitation period.

37. The greater weight of the evidence also supports the determination that Petitioner, as the corporate officer required to collect and pay sales tax on behalf of Taxpayer, willfully attempted to evade or defeat payment of Taxpayer's tax obligations. Of particular significance is Petitioner's lack of responsiveness to Ms. Chin's multiple attempts to communicate with her to resolve Taxpayer's obligations, and her evasiveness regarding the relationship between Taxpayer and the business entity operating under a new name at Taxpayer's business address and using Taxpayer's sales tax collection number. The evidence gives rise to the inference that Petitioner was attempting to operate the same business under a new name to evade or defeat Taxpayer's outstanding tax liabilities.<sup>6/</sup>

CONCLUSIONS OF LAW

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

39. Every person who engages in the business of selling tangible personal property at retail exercises privilege that is taxable under Florida law. See § 212.05, Fla. Stat. Taxes imposed pursuant to chapter 212 become state funds at the moment of collection and are required to be remitted on a monthly basis. Failure to timely remit sales taxes owed renders them delinquent. See § 212.15(1), Fla. Stat.

40. In this proceeding, Respondent has the initial burden to show that an assessment was made against Taxpayer, and that the factual and legal grounds for the assessment are correct. See § 120.80(14)(b)2. The burden of persuasion then shifts to Petitioner, who must prove, by a preponderance of the evidence, that the factual and legal bases for Respondent's assessment were incorrect or unreasonable. See Latin Express Serv. v. Dep't of Revenue, 687 So. 2d 1342 (Fla. 1st DCA 1997); see also Southern Bell Tel. and Tel. Co. v. Broward County, 665 So. 2d 272 (Fla. 4th DCA 1995) (taxpayer challenging an assessment has burden to show it could not be sustained under any reasonable hypothesis of legal assessment).

41. Section 213.21 authorizes Respondent to enter into STPAs to compromise the amount of taxes, interest, and penalties due and to schedule the repayment of these obligations.

42. To implement this authority, Respondent has adopted rule 12-17.008 which sets forth the specific items that must be included in STPAs. Among these is that the STPA must address is how Respondent "will allocate each payment to reduce the outstanding debt of tax, penalty, or interest as provided by section 213.75." Fla. Admin. Code R. 12-17.008(1)(e)(emphasis added).

43. Section 213.75(2) provides:

If a warrant or lien has been filed and recorded by the department, a payment shall be applied in priority order as follows:

- (a) First, against the costs to record the warrant or lien, if any;
- (b) The remaining amount, if any, shall be credited against the administrative collection processing fee;
- (c) The remaining amount, if any, shall be applied to accrued interest;
- (d) The remaining amount, if any, shall be credited against any accrued penalty; and
- (e) The remaining amount, if any, shall be credited to any tax due.

§ 213.75(2), Fla. Stat. (emphasis added).

44. Rule 12-17.008(3)(b) further provides that execution of an STPA does not invalidate or withdraw a warrant covered by the STPA, and rule 12-17.008(3)(c) states that an STPA becomes void if the taxpayer fails to comply with its conditions, submit

all tax returns, and pay all taxes in full that become due during the term of the STPA.

45. As previously discussed, Respondent demonstrated, by a preponderance of the evidence, that Taxpayer owed taxes, interest, and penalties for nonpayment of sales tax for numerous reporting periods. Respondent issued and recorded several warrants in an effort to collect on the outstanding taxes. Respondent established the correctness of the assessed amounts, and Petitioner did not show that these amounts were incorrect, departed from the requirements of law, or were unsupported by any reasonable hypothesis of legality.

46. Section 213.29 provides:

Any person who is required to collect, truthfully account for, and pay over any tax enumerated in chapter 201, chapter 206, or chapter 212 and who willfully fails to collect such tax or truthfully account for and pay over such tax or willfully attempts in any manner to evade or defeat such tax or the payment thereof; or any officer or director of a corporation who has administrative control over the collection and payment of such tax and who willfully directs any employee of the corporation to fail to collect or pay over, evade, defeat, or truthfully account for such tax shall, in addition to other penalties provided by law, be liable to a penalty equal to twice the total amount of the tax evaded or not accounted for or paid over. The filing of a protest based upon doubt as to liability or collection of a tax shall not be determined to be an attempt to evade tax under this section. The penalty imposed hereunder shall be in addition to any other penalty



imposed or that should have been imposed under the revenue laws of this state, but shall be abated to the extent that the tax is paid. Any penalty may be compromised by the executive director of the Department of Revenue as set forth in s. 213.21. An assessment of penalty made pursuant to this section shall be deemed prima facie correct in any judicial or quasi-judicial proceeding brought to collect this penalty.

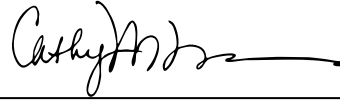
47. Respondent presented evidence sufficient to establish Petitioner's willful attempt to evade or defeat her responsibility, as President of Taxpayer, to collect and pay sale tax on behalf of Taxpayer; Petitioner did not present sufficiently persuasive evidence to counter this showing.

48. Accordingly, for the reasons set forth herein and pursuant to the foregoing statutes and rules, it is determined that Petitioner, as President of Taxpayer, is liable to Respondent for a penalty of \$18,345.14, which is twice the total amount of the sales and use tax owed by Taxpayer to the State of Florida.

#### RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby RECOMMENDED that Respondent, the Department of Revenue, enter a Final Order determining that Petitioner, Astrid Sarmentero, is liable for to Respondent for a penalty of \$18,345.14.

DONE AND ENTERED this 27th day of November, 2012, in  
Tallahassee, Leon County, Florida.



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CATHY M. SELLERS  
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 27th day of November, 2012.

ENDNOTES

<sup>1/</sup> Unless otherwise stated, all references are to 2011 Florida Statutes.

<sup>2/</sup> Petitioner failed to timely respond to Respondent's First Requests for Admission, which therefore were deemed admitted.

<sup>3/</sup> Petitioner testified that she entered into the STPA under the threat of her business being closed, and argues that under these circumstances, she should not be strictly held to the terms of the April 2008 STPA—specifically, with respect to the provision that establishes the priority order for payments pursuant to statute in the event of Taxpayer's breach of the STPA. However, the evidence does not show that Petitioner was forced to execute the STPA; to the contrary, the evidence establishes that Petitioner chose to enter into the STPA—albeit under less than ideal circumstances—in an effort to save her business.

<sup>4/</sup> During Ms. Chin's visits to the business location, Petitioner was the only person working at the business.

<sup>5/</sup> The STPA in this case consists of a completed form agreement. Respondent has adopted the form, Form DR-68, as a rule, to implement rule 12-17.007, Florida Administrative Code, which prescribes the requirements for STPAs. Petitioner has not

challenged either rule 12-17.007 or Form DR-68 pursuant to section 120.56.

<sup>6/</sup> Further, by failing to timely respond to Respondent's First Requests for Admission, Petitioner is deemed to have admitted the statement that "Petitioner willfully did not remit sales and use tax to the Department."

COPIES FURNISHED:

Joseph Mellichamp, Esquire  
Office of the Attorney General  
The Capitol, PL-01  
Tallahassee, Florida 32399

Carlos M. Samlut  
550 Biltmore Way  
Suite 200  
Coral Gables, Florida 33134

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

Nancy Terrel, General Counsel  
Department of Revenue  
Post Office Box 6668  
Tallahassee, Florida 32314-6668

Marshall Stranburg, Interim Executive Director  
Department of Revenue  
Post Office Box 6668  
Tallahassee, Florida 32314-6668

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.