

STATE OF FLORIDA DEPARTMENT OF REVENUE
TALLAHASSEE, FLORIDA

DOR 2013-002 - FOF
FILED

Department of Revenue – Agency Clerk
Date Filed: March 7, 2013
By: April Warner

ASTRID SARMENTERO AS PRESIDENT
FOR BELLA DONNA COUTURE, INC.,

Petitioner,

vs.

FLORIDA DEPARTMENT OF REVENUE

Respondent.

CASE NO. 11-4681

FINAL ORDER

This cause came before me, as Interim Executive Director of the Florida Department of Revenue (the Department) for the purpose of issuing a Final Order. The Administrative Law Judge assigned by the Division of Administrative Hearings heard this cause and submitted a Recommended Order to the Department. A copy of the Recommended Order, issued on November 27, 2012, by Administrative Law Judge Cathy M. Sellers (the ALJ), is attached to this order and is incorporated to the extent set forth herein. The Petitioner and Respondent requested an extension of time of 30 additional days to file exceptions to the Recommended Order on December 12, 2012. The request for extension of time was granted by the Department, and the Petitioner and Respondent timely filed exceptions to the Recommended Order, copies of which are also attached this Final Order. Rulings on the Petitioner's and Respondent's exceptions are set forth below. For the reasons expressed herein, the Department adopts the recommendations of the ALJ and specifically incorporates the Recommended Order except for Finding of Fact 31 and Conclusions of Law 40 and 45, which are modified as set forth below.

RULINGS ON PETITIONER'S EXCEPTIONS

Petitioner's exceptions to the Recommended Order state that Respondent did not meet the initial burden under section 120.80(14)(b)2., F.S., to establish a prima facie case showing that the assessment was factually and legally correct, that the assessment is time-barred by sections

95.091(2) and (3), F.S., and that Petitioner did not willfully attempt to evade or defeat payment of tax.

Section 120.57(1)(k), F.S., provides that “[t]he final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the Recommended Order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.” Because Petitioner’s exceptions to the Recommended Order failed to dispute the portion of the Recommended Order by page number or paragraph, fails to identify legal basis for exceptions, and does not include appropriate and specific citations to the record, the Department declines to rule on Petitioner’s exceptions.

Even if the Department rules on Petitioner’s exceptions, the Department must reject Petitioner’s request to reject the findings of fact by the ALJ in Paragraphs 32–37 of the Recommended Order. Section 120.57(1)(l), F.S., provides that “the agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record ... that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.”

“Competent substantial evidence” is “such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred” and that is “sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached.” De Groot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957). Agencies are bound to honor a presiding officer’s findings of fact when they are based upon competent substantial evidence. Section 120.57(1)(l), F.S. There is competent substantial evidence on the record to support the finding of facts by the ALJ.

RULINGS ON RESPONDENT’S EXCEPTIONS

Respondent takes exception to Paragraphs 31, 40, and 45, to the extent that the paragraphs state that Petitioner must prove that the assessment departs from the requirements of law or is not supported by any reasonable hypothesis of legality. Respondent stated that this statement is incorrect to the extent it concludes that Petitioner must prove the Department’s

assessment departs from the requirements of law or is not supported by any reasonable hypothesis of legality.

Section 120.80(14)(b)2., F.S., provides that “the applicable department’s burden of proof, except as otherwise specifically provided by general law, shall be limited to a showing that an assessment has been made against the taxpayer and the factual and legal grounds upon which the applicable department made the assessment.” If the Department makes a prima facie showing of the factual and legal sufficiency of its assessment, the burden of proof then shifts to Petitioner to demonstrate by a preponderance of the evidence that the assessment is incorrect. IPC Sports v. Dept. of Revenue, 829 So.2d 330, 332 (Fla. 3d DCA 2002), and Latin Exp. Service, Inc. v. Dept. of Revenue, 687 So.2d 1342 (Fla. 1st DCA 1997).

Accordingly, Finding of Fact 31 and Conclusion of Law 40 and 45 are modified as set forth below.

ADOPTION AND MODIFICATION OF THE RECOMMENDED ORDER

The Statement of the Issue and the Preliminary Statement as set forth in the ALJ’s Recommended Order are adopted in their entirety. The Department adopts and incorporates the Findings of Fact set forth in paragraphs 1 through 30 and 32 through 37 of the Recommended Order. The Department also adopts and incorporates the Conclusions of Law set forth in paragraphs 38, 39, 41 through 44, and 46 through 48 of the Recommended Order. Paragraph 31 of the Findings of Fact and Paragraphs 40 and 45 of the Conclusions of Law are modified as set forth below.

Finding of Fact 31

31. In this proceeding, Respondent has the initial burden under section 120.80(14)(b)2., F.S., 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.

Conclusion of Law 40

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 Section 120.80(14)(b)2., F.S. 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. See Latin Express Serv. v. Dep't of Revenue, 687 So.2d 1342 (Fla. 1st DCA 1997).

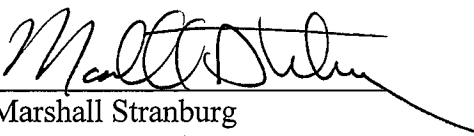
Conclusion of Law 45

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.

The Recommended Order, subject to the modifications stated above, is adopted and attached below.

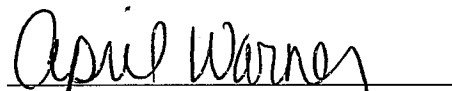
DONE AND ENTERED in Tallahassee, Leon County, Florida this 7th day of March, 2013.

STATE OF FLORIDA
DEPARTMENT OF REVENUE


Marshall Stranburg
Interim Executive Director

CERTIFICATE OF FILING

I HEREBY CERTIFY that the foregoing FINAL ORDER has been filed in the official records of the Department of Revenue this 7th day of March, 2013.


April Warner
Agency Clerk

Any party to this Order has the right to seek judicial review of the Order pursuant to Section 120.68, Florida Statutes, by filing a Notice of Appeal pursuant to Rule 9.110 Florida Rules of Appellate Procedure, with the Agency Clerk of the Department of Revenue in the Office of the General Counsel, P.O Box 6668, Tallahassee, Florida 32314-6668, and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. 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 to:

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