STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ROWE'S SUPERMARKETS, LLC,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 12-0698
	)	
DEPARTMENT OF REVENUE,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

On May 30, 2012, a duly-noticed hearing was conducted via video teleconferencing with sites in Tallahassee and Jacksonville, Florida, before Administrative Law Judge Lisa Shearer Nelson of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Christopher Ryan Maloney, Esquire
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For Respondent: Carrol Y. Cherry, Esquire
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STATEMENT OF THE ISSUE

The issue to be determined is whether Petitioner is liable for the sales and use tax, penalties, and interest assessed by the Department of Revenue and if so, what amount?

PRELIMINARY STATEMENT

On March 10, 2010, Respondent, Florida Department of Revenue ("the Department" or "DOR"), issued a Notice of Proposed Assessment ("NOPA") to Petitioner, Rowe's Supermarkets, LLC ("Rowe's"), for sales and use tax in the amount of $137,225.27; interest through March 10, 2010, in the amount of $44,755.99; and penalties of $59.70, plus interest to accrue after that date at a rate of $26.32 per day. By letter dated May 6, 2010, Petitioner filed a protest to dispute the NOPA.

On October 14, 2010, the Department issued a Notice of Decision that sustained the NOPA in full. On December 6, 2010, Petitioner timely filed a petition challenging the NOPA in its entirety and requesting an administrative hearing. The Department referred the case to the Division of Administrative Hearings on December 29, 2010, and it was initially docketed as DOAH Case No. 10-10932 and assigned to Administrative Law Judge Lawrence P. Stevenson. At the request of the parties, on February 22, 2011, an Order Closing File was issued with leave for either party to move to reopen the case in the event settlement could not be reached.

On February 16, 2012, the Department filed a Motion to Reopen Division File, seeking to re-open the case for hearing. The file was re-opened and docketed as Case No. 12-0698. On April 2, 2012, the case was noticed for hearing by video

teleconference on May 30, 2012. On May 16, 2012, the case was transferred to Administrative Law Judge Nelson and the hearing proceeded as previously scheduled.

At hearing, Petitioner presented the testimony of Robert Rowe and Neil Newman, and Petitioner's Exhibits 3, 6, 7, 10, 12, 15-22, and 25-26 were admitted into evidence. Petitioner's Exhibits 23-24 were not admitted but were proffered. Respondent presented the testimony of Delaine Arrington and Timothy Val Burgess, and Respondent's Exhibits 1-16, 18-19, and 21-24 were admitted into evidence. The parties filed a Joint Prehearing Stipulation that included facts for which the parties stipulated no proof was needed. Where relevant, those stipulated facts have been incorporated into the Findings of Fact below.

On June 18, 2012, a one-volume Transcript was filed with the Division. Both parties timely filed Proposed Recommended Orders that have been carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner, Rowe's Supermarkets, LLC ("Petitioner" or "Rowe's"), is a Florida limited liability company. Robert Rowe was the president and primary shareholder in Rowe's.

2. Respondent, Department of Revenue ("DOR" or "Respondent"), is an agency of the State of Florida authorized to

administer the tax laws of the State of Florida. §§ 20.21 and 213.51, Fla. Stat. (2011)

3. During the audit giving rise to this proceeding, Rowe's had its principal address at 5435 Blanding Boulevard, Jacksonville, Florida. Currently, Rowe's is located at 1431 Riverplace Boulevard, Jacksonville, Florida.

4. Rowe's organized in Florida on May 4, 2005.

5. Rowe's was a sales and use tax dealer registered with the Department to conduct business in this state. It was in business approximately four years.

6. Rowe's acquired several former Albertson's grocery retail stores, including the adjacent liquor stores, in Jacksonville, St. Augustine, and Orange Park, Florida. During the audit period, Rowe's sold five stores with the adjacent liquor stores.

7. Soon after beginning operation, Rowe's experienced significant financial difficulties which ultimately led to its demise. Its secured lender forced Rowe's to liquidate assets whenever possible, and all proceeds from the sale of the stores were paid directly into a locked account to Rowe's lender, Textron Financial.

8. On October 29, 2008, the Department issued to Rowe's a Notification to Audit Books and Records, Form DR-840, bearing

audit number 200048409, for sales and use tax, for the audit period beginning October 1, 2005, and ending September 30, 2008.

9. On August 14, 2009, the Department issued to Rowe's a Notice of Intent to Make Audit Changes, form DR-1215, for sales and use taxes, penalties and interest totaling $321,191.45, with additional interest accruing at $53.71 per day.

10. On August 20, 2009, Rowe's canceled its sales and use tax Certificate of Registration.

11. In a letter dated September 11, 2009, Rowe's requested an audit conference. The requested audit conference was held November 19, 2009.

12. On January 8, 2010, the Department issued the taxpayer a Notice of Intent to Make Audit Changes, form DR-1215, Revision #1, for sales and use tax, penalty and interest totaling $180,435.61, with additional interest accruing at $25.32 per day.

13. On March 10, 2010, the Department issued a NOPA, which indicated Rowe's owed $137,225.27 in sales and use tax; $44,755.99 in interest through March 10, 2010; and $59.70 in penalties, with additional interest accruing at $26.32 per day. Prior to issuance of the NOPA, the Department compromised $34,246.663 in penalties, based upon reasonable cause.

14. By letter dated May 6, 2010, Rowe's filed a protest to dispute the proposed assessment. The letter stated:

I am submitting this informal protest on behalf of Rowe's Supermarkets, LLC (RS) as its past President. RS is no longer in business and has not assets. Before this audit began RS was unable to pay its bills. Also, its line of credit, which was secured by all of RS's assets, was in default and had been called by the lender. RS was unable to refinance the loan because of its poor financial condition. As a result, it sold all of its assets to a new company which was able to obtain financing and used the proceeds of that sale to repay its secured loan. RS not only has no assets but also is subject to an unsatisfied judgment lien against it in the amount of $324,936.33, which has been accruing interest at 8% per year from August 25, 2009, the date the judgment was entered by the Circuit Court here in Jacksonville.

Even if Supermarkets was still in business and could pay its bills, we don't think it should be assessed with these taxes on the basis of the audit that was conducted. The auditor's lack of communication skills made it difficult for us to understand what information she needed. To the extent we understood her requests, we made every effort to provide her with the relevant information. But because most of the stores RS operated had already been closed, the only repository for obtaining accurate information was RS's general ledger, which she declined to review. She never explained why she made the proposed adjustments. We still don't know.

We did our best when RS was operating to properly collect all sales taxes, we reflected all of the sale tax collections in the general ledger and we timely turned over all of the those taxes to the department of revenue, as is clear in the general ledger. We request that the proposed assessment be dropped.

15. The Department issued a Notice of Decision on October 14, 2010, which sustained the assessment in full. In issuing its Notice of Decision, the Department did not review any issues related to the assessment other than doubt as to collectability. With respect to this issue, the Department stated, "[b]ased on our evaluation of all the factors of this case, including the financial information, we have concluded that it is not in the best interest of the State to accept your offer."

16. Petitioner's challenge to the assessment presents five issues: 1) whether it was entitled to an exemption in section 212.12(14) for those additional taxes assessed for "rounding" up to the whole cent as opposed to using the bracket system in section 212.12(9); 2) whether the Department's assessment of additional taxes for expenses was erroneous where it was based on a sampling plan not presented to or agreed to by the taxpayer; 3) whether the additional tax on liquor sales was based on an incorrect application of Florida Administrative Code Rule 12A-1.057(3)(a); 4) whether the Department violated the Taxpayer's Bill of Rights; and whether the Department was correct in determining that compromise of the assessment based on collectability was not in the best interest of the state. Each issue is treated separately below.

The Exemption pursuant to section 212.12(14)

17. Section 212.12(9) and (10), Florida Statutes, requires that sales taxes be paid on a "bracket system," and prescribes the amount of tax due for each portion of a dollar. Subsection (9) provides the tax brackets for those counties, such as St. Johns, which do not have a discretionary sales surtax and for which the tax rate is 6 percent. Subsection (10) provides the brackets for those counties, such as Duval and Clay, where a discretionary sales surtax of one percent has been adopted, making the sales-tax rate 7 percent.

18. Section 212.12(14) provides a "safe harbor" from additional assessment of taxes for those dealers who fail to apply the tax brackets required by section 212.12. The taxpayer is not assessed additional taxes, penalty, and interest based on the failure to apply the bracket system if it meets three requirements: that it acted in a good faith belief that rounding was the proper method of determining the amount of tax due; if it timely reported and remitted all taxes collected on each taxable transaction; and if the taxpayer agrees in writing to future compliance with the law and rules concerning brackets applicable to the dealer's transactions.

19. It is undisputed that Rowe's was not using the bracket system to calculate and collect sales taxes. The point-of-sale cash register system Rowe's purchased when opening its business

was represented to Petitioner as compliant with Florida requirements when in fact it was not.

20. The Department's auditor, Delaine Arrington, determined that assessment of additional taxes was appropriate because she believed that Rowe's had not timely reported and remitted all taxes collected on each taxable transaction, and that Rowe's had not agreed in writing to future compliance with respect to the bracketing system.

21. The sales tax records for Rowe's were based upon the meshing of three different computer systems. First, there was a point-of-sale system at each cash register which collected the data, such as sales amounts, taxable sales, and sales tax collected, for each individual transaction. A software system called BR Data would then "pull" the sales data from the individual cash registers to create the cumulative sales register reports for each store. The cumulative data from BR Data was then automatically imported into Petitioner's accounting software, MAS 90, to populate the figures in Rowe's general ledger.

22. Taxes collected were recorded in the general ledger under the credit column. The data in this column was transmitted from BR Data. It could not be adjusted manually, although other columns in the general ledger could be.

23. There were sometimes problems with the transmission of information from BR Data, which generally occurred where there was a power surge or a thunderstorm that would affect the communication of information. As a result of these communication problems, there were times that the sales figure transmitted would be double or triple the actual sales for that day. When such an error was discovered, Rowe's staff would contact BR Data and have the report rebuilt, and the general ledger entry would be corrected.

24. Rowe's informed Ms. Arrington that there had been numerous problems with the exporting process and the resulting need to correct journal entries. Ms. Arrington acknowledged at hearing that she had been advised that due to these problems, the sales figures were sometimes doubled or tripled.

25. Ms. Arrington reviewed the general sales ledger, the cumulative sales register reports, and the sales and use tax returns for the audit period. According to her review, there were three days in August 2006 where the amount of collected tax reflected in the cumulative sales register was higher than what was reflected in the general ledger. Based upon this review, she assessed $1,193.98 in additional sales taxes.

26. For August 1, 2006, the general ledger indicated that $263.48 in sales tax was collected. The cumulative sales report reflected that $790.44 in sales tax was collected. This second

number in the cumulative sales report is exactly three times the amount reflected in the general ledger. The difference between the cumulative sales report amount and the general ledger amount is $526.96.

27. For August 2, 2006, the general ledger indicated that $277.04 was collected. The cumulative sales report reflected that $554.08 in sales tax was collected, an amount exactly twice the amount recorded in the general ledger. The difference between the two documents is $277.04.

28. For August 11, 2006, the general ledger indicated that $389.98 in sales tax was collected. The cumulative sales report reflected that $779.96 was collected, an amount exactly twice the amount recorded in the general ledger. The difference between the two documents is $389.98.

29. The difference in the amounts reflected in the general ledger (which Rowe's claims is the more accurate document), and the cumulative sales register (which Ms. Arrington relied upon), is $1,193.98, the amount of additional tax assessed for this item.

30. Ms. Arrington acknowledged at hearing that she credited the cumulative sales register numbers over Rowe's general ledger documents, and that she knew during the audit that there were issues relating to BR Data that occurred during the audit period.

The only document upon which she relied was the cumulative sales register.

31. Given the credible testimony by Robert Rowe and Neil Newman regarding the process and the problems encountered with the interface of data, and the fact that in each instance, the difference was an exact multiple of the amount reflected in the general ledger, the greater weight of the evidence presented at hearing supports the finding that the general ledger represents the amount of sales tax actually collected and paid by Rowe's.

32. This finding means that not only is the assessment of additional sales tax for August 2006, in error, but also that means that Rowe's met the second requirement for avoiding the assessment of additional taxes under section 212.12(14) for failing to use the bracket system.

33. Ms. Arrington also found that Rowe's had not agreed in writing to future compliance with the bracket system.

34. On or about November 19, 2009, in conjunction with the Audit Conference, Ms. Arrington prepared an Agreement for Future Compliance (Agreement) and provided it to Mr. Rowe for signature. The text of the Agreement, which is on DOR letterhead and specifically references the Sales and Use Tax Audit number for Rowe's, states:

> The following dealer had demonstrated the proper actions required by Section 212.12(14),(a) and (b), F.S. (see

> attachment), and agree [sic] to sign the following suggested form to compliance with the laws concerning brackets applicable to the dealer's transactions in the future.
>
> Rowe's Supermarkets, LLC - BP#2134130, succeeded by Rowe's IGA, LLC - 3082649 agrees to future compliance with the laws and rules concerning the proper application of the tax bracket system to the dealer's transactions.

35. Mr. Rowe did not sign the Agreement at the Audit Conference because he wanted to be able to confirm that the point of sale system his store operated could be properly programmed to comply with the bracket system before signing a document stating he would comply. After discussions with both the vendor and Ms. Arrington, and making sure the system was in fact operating in compliance with the requirement, Mr. Rowe signed the Agreement on December 7, 2009, and returned it to the Department.

36. Ms. Arrington did not recall receiving the Agreement, but also admitted she had no specific memory as to whether she received it. Her Case Activity Record indicates that on December 3, 2009, she spoke with Mr. Rowe about whether he was able to input the brackets in his point-of-sale system, and that he indicated he was able to do so.

37. The greater weight of the evidence supports the finding that Mr. Rowe executed and returned the Agreement, and it is so found.

The Use Tax Assessment Based on a Sampling Plan

38. Section 212.12 allows the Department to use a sample from the taxpayer's records and project audit findings from the sample to the entire audit period where the records of the taxpayer are "adequate but voluminous in nature and substance." The statute, which is discussed in more detail in the Conclusions of Law, contemplates the use of a sampling plan agreed to by the taxpayer, and in the absence of an agreement, the taxpayer's right to have a review by the Department's Executive Director.

39. The work papers to the Notice of Intent to Make Audit Changes dated January 8, 2010, include a sampling plan that runs from January 1, 2006, to December 31, 2006 for the calculation of use tax for purchases by Rowe's where sales tax was not collected by the vendor.

40. Ms. Arrington reviewed Rowe's' records for expense purchases for 2006 to determine the total amount of additional tax due for that period. She then took the total additional tax on expenses for that period, i.e., $14,981.26, and divided it by 12 to obtain a monthly average additional tax of $1,248.44. She then applied that number to the entire 36-month audit period to determine a total assessment of additional tax for expense purchases of $44,943.84.

41. Ms. Arrington testified that at the initial audit conference, she discussed different audit techniques in terms of sampling. However, a specific sampling plan was not discussed with Mr. Rowe and no Sampling Agreement was presented to him. No sampling plan was reviewed by the Executive Director. Ms. Arrington did not tell Mr. Rowe that 2006 would be the year used as the sample.

42. Mr. Rowe never would have agreed to the use of 2006 as a sampling plan, because it would not be representative of the expenses incurred during the audit period. Using 2006 as a sampling period did not take into account the store closures during the audit period, and the concomitant reduction in expenses.

43. Rowe's closed two grocery stores by March 2006, and operated only four stores for the remaining three quarters of the year. A third store was closed in January 2007, a fourth in May 2007 and a fifth in 2008, leaving only one store open for the entire audit period. All of the liquor stores were also closed during the audit period, the last one being sold in May 2008.

44. Ms. Arrington knew that Rowe's had closed almost all of its stores during the audit period, and included information regarding the closings in her Standard Audit Report. She acknowledged at hearing that as the stores decreased, the expenses related to those stores would also most likely decrease.

45. For the 12 months of 2006, the Department determined that an additional tax of $14,981.26 would be due, based on purchases of $253,637.22. There has been no evidence presented to rebut the accuracy of the tax assessment for these 2006 purchases. Petitioner presented evidence establishing that, for the 21 months of the audit period following 2006, Rowe's made purchases from the same vendors reflected in the 2006 sample of only $51,073.72, which would result in additional taxes of $3,575.16. No evidence was presented by either party as to whether there were any other purchases from other vendors for which taxes had not been paid. The difference between the use tax assessed against Rowe's by using the sampling plan and taxes due based on the actual purchases demonstrated at hearing is $22,642.08.

46. In addition, there was one vendor, Advo, Inc. (Advo), which accounted for a significant percentage of the tax due based on the sampling plan. While the audit sample period was for twelve months, payments to Advo for a seven-month period accounted for approximately 58% of the total additional taxes due for expenses. There were no purchases from Advo after July 2006 because of Rowe's shrinking assets and inability to pay for direct advertising. Further, 15 of the 23 vendors reflected in the sample period from whom purchases were made had no sales to Rowe's from January 2007 through September 2008.

47. The Department's work papers indicate that, within the sample year, the purchases tapered off significantly as the year progressed. Given the known closure of five grocery stores and six liquor stores during the audit period, using a time period where the most stores were open is not representative of the expenses experienced by Petitioner, and use of the sampling plan to which the taxpayer had not agreed was inappropriate, and led to an inflated assessment of additional taxes.

The Effective Tax Rate at the Liquor Stores

48. During the audit period, Rowe's operated package liquor stores adjacent to the grocery stores. By the time the audit commenced, Rowe's no longer owned any of the liquor stores, and no longer had the cash register tapes from the liquor stores. Because of the lack of cash register tapes, the auditor was unable to determine the effective tax rate Rowe's was collecting. She did not, however, ask Rowe's what rate was collected. A review of the sales tax returns indicates that it remitted a flat rate of 6 or 7 percent, depending on the county. These rates were consistent with what Rowe's was collecting for the grocery store sales, and cash register tapes were available from the grocery store.

49. Ms. Arrington applied the tax rates identified in Florida Administrative Code Rules 12A-1.057(3)(a) and 12A-15.012(2)(a), both of which identify the rate that should be

collected where the dealer sells package goods but does not sell mixed drinks; does not separately itemize the sales price and the tax; and does not put the public on notice that tax is included in the total charge.

50. The work papers paraphrase but do not quote the rules. With respect to the liquor store in St. Johns County, the work papers state: "[a]ccording to Rule 12A-1.057(3)(a), F.A.C., when the dealer is located in a county with no surtax and the public has not been put on notice through the posting of price lists or signs prominently displayed throughout the establishment that the tax is included in the total charge, package stores which sell no mixed drinks shall remit tax at the effective rate of .0635."

51. With respect to the liquor stores in Clay and Duval Counties, the work papers state: "[a]ccording to Rule 12A-15.012(2)(a)1., F.A.C., when a dealer, located in a county imposing a 1% surtax, sells package goods but does not sell mixed drinks and does not put the public on notice that tax is included in the total charge, the dealer is required to remit tax at the effective tax rate of .0730."

52. The Department's auditor made the assumption that tax was not separately itemized for package store sales and assessed the additional tax accordingly. She did not ask the taxpayer whether this was the case and did not ask about signage in the package stores that were no longer owned by Rowe's.

53. Mr. Rowe testified that the same point-of-sale program was used for the liquor stores as were used for the adjacent grocery stores. That program separately identified the tax due. His testimony is unrebutted and is credited.

The Taxpayer's Bill of Rights

54. At hearing, Petitioner took the position that the Department violated the Taxpayer's Bill of Rights as stated in section 213.015(5), by its failure to provide Petitioner with a "narrative description which explains the basis of audit changes, proposed assessments, assessments."

55. In its Proposed Recommended Order, however, Petitioner candidly acknowledged that the evidence did not support a finding consistent with Petitioner's position. In light of this concession, no further findings of fact are necessary with respect to this issue.

Collectibility

56. Rowe's asserted in its challenge that it was unable to pay any taxes assessed because it was no longer in business and no longer had any assets.

57. The Department declined to exercise its discretion to compromise the tax assessment based on collectability. While not specifically stated in its Notice of Decision, this position was apparently based upon the belief that the taxes could be paid by

Rowe's IGA, LLC, to whom the assets of Rowe's was sold, and which shares the same managing member, Robert Rowe.

58. The two companies share a managing member and one common location, which Rowe's sold to Rowe's IGA. However, no evidence was presented regarding the specifics of the assets sold to Rowe's IGA, and the only evidence presented indicates that any proceeds from the sale went to pay the secured lender for Rowe's, Textron Financial. Other than the involvement of Robert Rowe, no connection between the companies was established.

59. Rowe's provided to the Department the copy of a judgment against it for $324,963.33, which bears interest at a rate of 8% annually. The Department did not identify any assets from which either the assessment or the judgment could be paid.

CONCLUSIONS OF LAW

60. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with sections 120.569 and 120.57(1), Florida Statutes (2011).

61. The Department is the state agency authorized to conduct audits relating to sales and use tax imposed pursuant to chapter 212, Florida Statutes, and to request information of a dealer to ascertain the dealer's liability, if any. § 212.13, Fla. Stat.

62. In these proceedings, the Department bears the initial burden to demonstrate that the assessment has been made against the taxpayer, in this case against Rowe's, and the factual and legal grounds upon which the Department made the assessment. The burden then shifts to the Petitioner to demonstrate by a preponderance of the evidence that the assessment is incorrect. § 120.80(14)(b)(2), Fla. Stat.; IPC Sports, Inc. v. Dep't of Revenue, 829 So. 2d 330 (Fla. 3d DCA 2002).[1/]

63. In tax assessment cases, tax laws are strictly construed in favor of the taxpayer and against the government. Maas Brothers, Inc. v. Dickinson, 195 So. 2d 193, 198 (Fla. 1967); Allied Marine Group v. Dep't of Revenue, 701 So 2d 630, 631 (Fla. 4th DCA 1997).

64. Petitioner's first assertion concerns the assessment of additional tax for failure to comply with the bracket system contained in section 212.12(9) and (10). It contends that it was entitled to the safe harbor contained in section 212.12(14), which states:

> (14) If it is determined upon audit that a dealer has collected and remitted taxes by applying the applicable tax rate to each transaction as described in subsection (9) and rounding the tax due to the nearest whole cent rather than applying the appropriate bracket system provided by law or department rule, the dealer shall not be held liable for additional tax, penalty, and interest resulting from such failure if:

> (a) The dealer acted in a good faith belief that rounding to the nearest whole cent was the proper method of determining the amount of tax due on each taxable transaction.
> (b) The dealer timely reported and remitted all taxes collected on each taxable transaction.
> (c) The dealer agrees in writing to future compliance with the laws and rules concerning brackets applicable to the dealer's transactions.

65. The Department did not dispute that Rowe's was acting in good faith. It contended that Petitioner did not meet the second and third requirements of subsection (14), because it did not remit all sales tax collected in August 2006, and did not sign a compliance agreement. However, as found in findings of fact 31-32, the preponderance of the evidence indicates that Petitioner did in fact remit all sales tax collected for the month of August 2006. Therefore, not only was the assessment of additional taxes, penalty, and interest for August 2006 in error, but the determination that Petitioner had not remitted all taxes collected as required for the safe harbor provision also in error.

66. Likewise, the preponderance of the evidence demonstrated that Petitioner did complete and return the Agreement to comply with the bracket system. Accordingly, Petitioner met the requirements of section 212.12(14), and the assessment of additional taxes, interest, and penalties for failing to comply with the bracket system was in error.

67. The assessment of additional use taxes for expense purchases by Petitioner is based on a sampling plan used by the Department. The use of sampling plans is authorized by section 212.12(6)(c), which provides:

> (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 therefrom 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. In order to conduct such a sample, the department must first make a good faith effort to reach an agreement with the dealer, which agreement provides for the means and methods to be used in the sampling process. In the event that no agreement is reached, the dealer is entitled to a review by the executive director. . . .

68. The evidence presented is very clear that the Department did not make a good faith effort to reach an agreement with Rowe's regarding the sampling plan. The evidence indicates that the sampling agreement was never even presented to Petitioner. Inasmuch as section 212.12(6)(c)1. makes a good faith effort to reach an agreement a condition precedent for employing a sampling plan, the Department was not entitled to use the sampling plan to evaluate expense purchases in this case.

69. The Department argues that Rowe's did not ask for a review by the Executive Director, and therefore waived any challenge to the sampling plan. However, when the Department

does not present a sampling agreement to the taxpayer in the first place, there is nothing for the taxpayer to ask the Executive Director to review. The Department is affirmatively required to make a good faith effort to reach an agreement with the taxpayer, which it clearly did not do here.

70. Moreover, the particular sampling plan used in this case is fundamentally flawed, given the known condition of the taxpayer during the audit period. At the beginning of the audit period, Rowe's had six grocery stores and six adjacent liquor stores. The Department was aware that all but one grocery store and all of the liquor stores were sold. Under these circumstances, it was virtually guaranteed that expenses from 2006 would not be a representative sample of the audit period. Accordingly, while the Department established that an assessment had been made, it did not establish a factual and legal basis for using the sampling plan. Therefore, the application of the additional taxes due in relation to expense purchases for 2006 cannot be applied to the entire audit period.

71. Rowe's presented evidence of what the assessment might be, assuming purchases for the remainder of the audit period from the vendors used in 2006 were taxable purchases for which taxes are due. It did so in order to show that the amount assessed was grossly inflated compared to actual purchases, which it is. However, the Department has not reviewed those records and made

no assessment based on those records. While it presented a factual and legal basis for the use taxes due on expense purchases made for the 12-month period comprising 2006, and the assessment for those expenses should be sustained, DOR has not met its burden with respect to the remainder of the audit period to show the factual and legal basis for the assessment related to expense purchases.

72. Petitioner also disputes the application of a higher rate of sales tax on liquor sales in the liquor stores. Rowe's collected and remitted a flat 6 or 7 percent sales tax, depending on the county. DOR assessed additional taxes based upon rules 12A-1.057(3) and 12A-15.012(2)(a). For St. Johns County, the Department applied the provisions of rule 12A-1.057(3)(a). The rule provides in pertinent part:

> 12A-1.057 Alcoholic and Malt Beverages.
>
> (1) Alcoholic beverages, including beer, ale, and wine are taxable. The dealer shall add the tax to the sale price (including any other state and federal taxes) of each sale and he shall not advertise or hold out to the public in any manner that he will absorb any part of the tax or that he will relieve the purchaser from the payment thereof. However, nothing herein contained shall be construed as prohibiting a dealer from setting his prices on the sale of alcoholic beverages in such a manner as to avoid the handling of pennies; PROVIDED, HOWEVER, that each and every one of the dealer's price lists shall show the price of the beverage and the amount of tax due thereon as separate items. For example, a dealer's

> price may list a bottle of beer for 47¢, sales tax 3¢, total 50¢; a glass of wine for 80¢ plus sales tax of 5¢, total 85¢; or a cocktail for $1.69 plus sales tax of 11¢, total $1.80.
>
> * * *
>
> (3) In some instances, it may be impractical for a dealer to separately record the sales price of the beverage and the tax thereon. In such cases, for the privilege of deviating from the requirement of subsection (1) above, a dealer shall remit tax in accordance with one of the methods outlined below, and his records must substantiate the method so elected.
> (a) When the public has not been put on notice through the posting of price lists or signs prominently displayed throughout the establishment that the tax is included in the total charge, package stores which sell no mixed drinks shall remit tax at rate of 6.35 percent of their total receipts. Dealers who sell mixed drinks or a combination of mixed drinks and package goods shall remit the tax at the rate of 6.59 percent of their total receipts. (Emphasis supplied.)

73. The auditor assumed that the provisions of subsection (3)(a) were applicable, and applied a 6.35 percent rate to the liquor sales in St. Johns County. She did so because she did not have the sales tapes from the liquor stores. However, she had no factual basis for determining that sales tax was not separately recorded from the sales price, especially where she had access to the grocery sales receipts, which used the same point-of-sale system and separately itemized the sales price and the tax to be

paid. It is only where those items are not separately itemized that the provisions of subsection (3) should come into play.

74. Clay and Duval Counties both assess a surtax on liquor sales. Accordingly, the Department applied the provisions of rule 12A-15.012(2)(a). The rule provides in pertinent part;

> 12A-15.012 Alcoholic and Malt Beverages.
> (1)(a) Alcoholic beverages, including beer, ale, and wine, are subject to surtax at the rate imposed by the county where the business is located. The dealer shall add the sales tax, plus the applicable surtax, to the sales price of each sale. The dealer is not permitted to advertise or hold out to the public in any manner that the dealer will absorb any part of the sales tax or surtax due or that the dealer will relieve the purchaser from the payment of sales tax or surtax.
> (b) In some instances, it may be impractical for dealers who sell package goods, mixed drinks, or a combination of package goods and mixed drinks to separately itemize the sales price of the beverage and the tax. In such cases, a dealer is required to remit tax in accordance with one of the methods outlined below, and the dealer's records must substantiate the method chosen.
> (2) DEALERS WHO DO NOT SELL MIXED DRINKS.
> (a)1. When a dealer, located in a county imposing a surtax, who sells package goods but does not sell mixed drinks, does not put the public on notice that tax is included in the total charge, the dealer is required to remit tax at the following rates. The dealer should multiply the total gross receipts derived from the sale of package goods by the following effective tax rates to compute the amount of sales tax, plus surtax, due. (Emphasis supplied.)

75. As with the sales in St. Johns County, the auditor assumed that Rowe's did not separately itemize the liquor sales price and the corresponding tax. As with the sales in St. Johns County, the liquor stores in Clay and Duval Counties shared the same point-of-sale system as the grocery stores. The auditor had no factual basis for assuming that sales tax was not separately stated, which means there is no factual basis for applying the higher rate identified in subsection (2) of the rule.

76. Without application of the higher rates used by the auditor, the bracket system in section 212.12(10) discussed earlier would still apply. However, Rowe's would be entitled to the safe harbor in section 212.12(14) in that it acted in good faith; remitted all taxes collected; and signed an agreement for future compliance. Therefore, the assessment of additional taxes, penalty and interest on the sale of liquor at the stores in St. Johns, Clay and Duval County was not warranted.

77. Rowe's also alleged that the Department violated the Taxpayer's Bill of Rights, as stated in section 213.015(5), by its failure to provide Petitioner with a "narrative description which explains the basis of audit changes, proposed assessments, assessments." In its Proposed Recommended Order, Petitioner concedes that the evidence at hearing would not support such a conclusion.

78. Finally, Rowe's challenged the assessment based on the inability to pay. Section 213.21(3)(a), Florida Statutes, provides in pertinent part that "[a] taxpayer's liability for any tax or interest specified in s. 72.011(1) may be compromised by the department upon the grounds of doubt as to liability for or collectibility of such tax or interest." Florida Administrative Code Rule 12-13.006, which implements section 213.21(3), provides:

> Tax or interest or both will be compromised or settled on the grounds of "doubt as to collectibility" when it is determined that the financial status of the taxpayer is such that it is in the best interests of the State to settle or compromise the matter because full payment of the unpaid obligation is highly doubtful and there appears to be an advantage in having the case permanently and conclusively closed. The discretion to make this determination is delegated pursuant to the procedures in Rule 12-13.004, F.A.C.

79. Rule 12-13.004, in turn, provides the delegation structure for what officials have the authority to compromise tax liabilities at different dollar amounts.

80. The ability to compromise a tax assessment pursuant to section 213.21(3)(a) is discretionary. In reaching that discretionary decision the Department looks to whether full payment of the obligation is "highly doubtful and there appears to be an advantage in having the case . . . closed." The Department declined to make a finding here, apparently based on the fact that

Robert Rowe was a shareholder in Rowe's and is now a managing member in Rowe's IGA.

81. The record in this case does not demonstrate that there are any assets from which the remaining tax assessment could be paid. However, the use of the Department's discretion to compromise the debt is premised on two factors: inability to pay and the best interest of the State. The undersigned is not inclined to state that the Department abused its discretion. However, it is recommended that it reconsider its decision to compromise the remaining debt based on the record presented in this case.

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:

1. Reduces the Department's assessment for additional taxes, penalties, and interest by any amounts attributable to the failure to comply with the sales bracket system at Petitioner's grocery stores;

2. Reduces the Department's assessment for additional use taxes, penalties, and interest by any amounts attributable to the failure to remit all taxes due for the month of August 2006;

3. Reduces the Department's assessment for additional use taxes, penalties, and interest by any amounts attributable to expense purchases for the period January 2007 through September 2008;

4. Sustains the assessment for additional use tax, penalties, and interest for expense purchases in calendar year 2006;

5. Reduces the Department's assessment for additional use taxes, penalties, and interest by any amounts attributable to the asserted basis that Petitioner should have collected tax at a higher effective tax rate at its liquor stores based upon the application of rules 12A-1.057(3)(a) or 12A-15.012(2)(a);

6. Sustains the Department's assessment for additional sales tax, penalties, and interest against Petitioner for failure to pay tax on certain capital asset purchases identified in the audit;

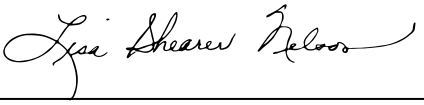
7. Sustains the Department's assessment for additional sales tax, penalties, and interest against Petitioner for failure to pay sales tax on commercial rent payments under certain of Petitioner's store leases identified in the audit; and

8. Sustains the Department's assessment for additional sales tax, penalties, and interest against Petitioner for failure to pay sales tax on Petitioner's payment of ad valorem taxes

under certain of Petitioner's store leases identified in the audit.

In addition, it is Recommended that the Department reconsider its decision as to whether the remaining assessment is collectible, and whether it is in the best interest of the state to compromise the assessment, based on the record contained in this proceeding.

DONE AND ENTERED this 31st day of July, 2012, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of July, 2012.

ENDNOTE

[1/] The Department asserts in its Proposed Recommended Order that the provisions of subsection 212.12(5)(b) apply, making its assessment prima facie correct, with the burden to show otherwise resting on the dealer. However, section 212.12(5)(b) applies when a dealer fails to make its records available for inspection "so that no audit or examination has been made of the books and records." That is not the case here. In any event, even under these circumstances, Petitioner has met this burden with respect to the issues discussed above.

COPIES FURNISHED:

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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.