

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ECHO ARTZ, LLC,)
)
 Petitioner,)
)
 vs.) Case No. 12-0791
)
 DEPARTMENT OF REVENUE,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER OF DISMISSAL

On April 25, 2012, Respondent, Department of Revenue (the "Department") filed a Motion to Dismiss for Lack of Jurisdiction ("Motion to Dismiss"). No response to the Motion to Dismiss was filed by Petitioner, Echo Artz, LLC ("Echo Artz"). Pursuant to notice, a final hearing was commenced on May 17, 2012, via video teleconferencing with sites in Tallahassee and Orlando, Florida. The Department's Motion to Dismiss was considered at the commencement of the final hearing. After consideration of the position of the parties and hearing argument of counsel, the Motion to Dismiss was granted. This Recommended Order of Dismissal sets forth the basis for the Administrative Law Judge's decision.

FINDINGS OF FACT

1. During the discovery phase of this proceeding, the Department ascertained from Echo Artz that \$4,070 (the

"Uncontested Amount") of the assessed tax was not contested. That is, Echo Artz agreed that it owed at least that amount of the total tax assessment of \$67,757.46 set forth in the Notice. Of the total amount set forth in the Notice, \$54,626.25 was the tax portion and the remainder was interest. No penalties were imposed as of the date of the Notice of Proposed Assessment. The Uncontested Amount was approximately 7.5 percent of the tax portion and approximately 5.9 percent of the total assessment.

2. At the final hearing, during discussion of the Department's Motion to Dismiss, Echo Artz stated that the Uncontested Amount was erroneous. Instead, it stated that \$23,135 of the total tax assessment was actually uncontested. The total tax portion of the assessment should be, according to Echo Artz, \$57,730. The revised uncontested amount was approximately 40 percent of the total tax portion.

3. Echo Artz did not pay any of the Uncontested Amount or any of the revised uncontested amount pursuant to its own calculations. The Department asserts that inasmuch as Echo Artz failed to pay the Uncontested Amount prior to filing its request for formal hearing, the case must be dismissed as required by law.

CONCLUSIONS OF LAW

4. Section 120.80(14)(b), Florida Statutes, provides in pertinent part^{1/}:

Taxpayer contest proceedings:

1. In any administrative proceeding brought pursuant to this chapter as authorized by s. 72.011(1), the taxpayer shall be designated as the "petitioner" and the Department of Revenue shall be designated as the "respondent"

* * *

3.a. Prior to filing a petition under this chapter, the taxpayer shall pay to the applicable department the amount of taxes, penalties, and accrued interest assessed by that department which are not being contested by the taxpayer. Failure to pay the uncontested amount shall result in the dismissal of the action and imposition of an additional penalty of 25 percent of the amount taxed.

b. The requirements of s. 72.011(2) and (3) (a) are jurisdictional for any action under this chapter to contest an assessment

5. Section 128.80(14), Florida Statutes, which cross-references section 72.011(3) (a), Florida Statutes, makes the prerequisite of paying the Uncontested Amount a jurisdictional issue at the Division of Administrative Hearings to the same extent it is jurisdictional in Circuit Court. This jurisdictional requirement is in lieu of a bond being posted for the entire amount assessed. See Dep't of Rev. v. Nu-Life Health & Fitness Ctr., 623 So. 2d 747, 751-752 (Fla. 1st DCA 1992).

6. Section 72.011(3) states in pertinent part:

In any action filed in circuit court contesting the legality of any tax,

interest, or penalty assessed under a section or chapter specified in Subsection (1), the plaintiff must:

(a) Pay to the applicable department or county the amount of the tax, penalty, and accrued interest assessed by the department, or county which is not being contested by the taxpayer

* * *

Failure to pay the uncontested amount as required in paragraph (a) shall result in the dismissal of the action and imposition of an additional penalty in the amount of 25 percent of the tax assessed. Provided, however, that if, at any point in the action, it is determined or discovered that a plaintiff, due to a good faith de minimis error, failed to comply with any of the requirements of paragraph (a) or paragraph (b), the plaintiff shall be given a reasonable time within which to comply before the action is dismissed. For purposes of this subsection, there shall be a rebuttable presumption that if the error involves an amount equal to or less than 5 percent of the total assessment the error is de minimis and that if the error is more than 5 percent of the total assessment the error is not de minimis.

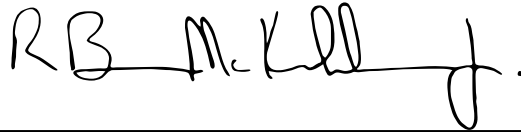
7. Echo Artz did not pay the Uncontested Amount, which constitutes in excess of five percent of the assessed tax portion set forth in the Notice. If its own calculation of the tax assessment and Uncontested Amount is correct, then Echo Artz still failed to pay an Uncontested Amount that is greater than five percent of the total assessment. It failed, therefore, to

satisfy a condition precedent to challenging the contested portion of the assessed tax.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Respondent, Department of Revenue, enter a final order of dismissal.

DONE AND ENTERED this 18th day of May, 2012, in Tallahassee, Leon County, Florida.



R. BRUCE MCKIBBEN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of May, 2012.

ENDNOTE

^{1/} Unless specifically stated otherwise herein, all references to Florida Statutes are to the 2011 version.

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.