

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

AMERICAN BUSINESS USA CORP.,            )  
  )  
    Petitioner,                                )  
  )  
vs.    )     Case No. 12-2527  
  )  
DEPARTMENT OF REVENUE,                    )  
  )  
    Respondent.                                )  
\_\_\_\_\_  
  )

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on January 10, 2013, in Miami, Florida, before Administrative Law Judge Claude B. Arrington of the Division of Administrative Hearings (DOAH).

APPEARANCES

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For Respondent: Carrol Y. Cherry, Esquire  
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STATEMENT OF THE ISSUE

Whether the Department of Revenue's (Department) assessment of tax and interest against American Business USA Corp. (Taxpayer) is valid and correct.

PRELIMINARY STATEMENT

Following an audit, the Department assessed against the Taxpayer additional sales and use taxes in the sum of \$137,225.27, plus interest. No penalty is being sought. The Taxpayer denied liability and requested a formal administrative hearing to challenge the assessment. The matter was referred to DOAH, and this proceeding followed.

Prior to the formal hearing, the parties filed a Joint Pre-Hearing Stipulation that contained factual stipulations that are incorporated in the Findings of Fact section of this Recommended Order.

The Taxpayer asserts that it is not liable for the assessed sales taxes because it is not a "florist" within the meaning of Florida Administrative Code Rule 12A-1.047. The Taxpayer also asserts that it relied on advice and instruction from the Department when it failed to collect sales tax on prepaid calling arrangements, and should not be subject to any taxes or penalties as a result of its reasonable reliance.

At the formal hearing, Mauricio Gomez and Blanca Niño, the owners of the Taxpayer, testified on behalf of the Taxpayer. The Taxpayer offered no exhibits. The Department presented no witnesses, but offered 16 exhibits, each of which was admitted into evidence.

No transcript has been filed. Each party timely filed a Proposed Recommended Order, which has been duly considered by the undersigned in the preparation of this Recommended Order.

Unless otherwise noted, all statutory references are to Florida Statutes (2012). 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 responsible for administering the revenue laws of the state of Florida, including the imposition and collection of the state's sales and use taxes pursuant to chapter 212, Florida Statutes.

2. The Taxpayer is an active for-profit corporation with its principal address and mailing address at 12805 Newton Place, Wellington, Florida 33414-6226.

3. The Taxpayer is a "dealer" as that term is defined by section 212.06(2). The Taxpayer has a federal employer identification number and a certificate of registration number.<sup>1/</sup>

4. The Taxpayer began doing business in Florida in January 2001, but did not register with the Department as a sales tax dealer until February 19, 2004. The Taxpayer does business as "1Vende.com."

5. The Department audited the Taxpayer for sales and use tax compliance. The audit period was April 1, 2008, through March 31, 2011.

FACTS RELATED TO THE AUDIT PERIOD

6. Mr. Gomez and Ms. Niño, who are husband and wife, each hold 50 percent of the shares in the Taxpayer.

7. There were two principal aspects of the Taxpayer's business during the audit period. First, the Taxpayer specialized in the sale of flowers, gift baskets, and other items of tangible personal property. Second, the Taxpayer specialized in the sale of "prepaid calling arrangements," within the meaning of section 212.05(1)(1).

8. All of the Taxpayer's sales were initiated online.

9. The Taxpayer sold to customers throughout Latin America, in Spain, and in the United States (including Florida).

10. All payments to the Taxpayer were made by credit card or wire transfer.

11. The Taxpayer generated electronic invoices for all its sales.

12. The Taxpayer marketed itself to the public on its website as a company that sells flowers.

13. The Taxpayer did not maintain any inventory of flowers, gift baskets, or other items of tangible personal property.

14. When the Taxpayer received an order over the Internet for items of tangible personal property, the Taxpayer relayed the order to a florist in the vicinity of the customer (the local florist). The Taxpayer utilized the Internet or telephone to relay an order. The Taxpayer did not use telegraph. The Taxpayer used a local florist to fill the order it had received for flowers, gift baskets, and other items of tangible personal property.

15. The Taxpayer charged its customers sales tax on sales of flowers, gift baskets, and other items of tangible personal property delivered in Florida.

16. The Taxpayer did not charge its customers sales tax on sales of flowers, gift baskets, and other items of tangible personal property delivered outside of Florida.

17. The Taxpayer did not charge sales tax on the delivery fee it charged its customers on orders of flowers, gift baskets, and other items of tangible personal property.

18. The Taxpayer primarily sold prepaid calling arrangements in \$2.00, \$5.00, \$10.00, and \$20.00 increments.

19. When customers purchased prepaid calling arrangements, the Taxpayer sent them an authorization number by email.

20. The Taxpayer did not charge its customers sales tax on the prepaid calling arrangements it sold.

THE AUDIT

21. The Taxpayer filed its federal tax returns on an accrual basis with the fiscal year ending December 31.

22. The taxpayer's accountant recorded sales on the federal tax returns (form IRS 1120) based on the deposits recorded on the bank statements.

23. Mr. Gomez prepared the Florida sales and use tax returns (form DR-15) for the Taxpayer and calculated the tax due by multiplying its taxable sales by the applicable tax rate.

24. On May 9, 2011, the Department mailed the Taxpayer a Notice of Intent to Audit Books and Records, form DR-840, for audit 200105422.

25. The Department requested Mr. Gomez provide for audit the Taxpayer's chart of accounts, general ledgers, cash receipt journals, sales journals, resale certificates, general journals, federal tax returns, state sales tax returns, shipping documents, and bank statements.

26. Along with the DR-840, the Department mailed the Taxpayer a Pre-audit Questionnaire and Request for Information and Electronic Audit Survey.

27. On May 23, 2011, the Taxpayer returned to the Department the completed Pre-audit Questionnaire and Request for Information and Electronic Audit Survey.

28. On June 15, 2011, the Department's auditor and Mr. Gomez had a pre-audit interview, in which they discussed auditing techniques and records available for audit.

29. Mr. Gomez provided for audit a download of the Taxpayer's electronic records, including its sales database, bank statements, and federal tax returns.

30. The Taxpayer did not keep for audit books and records that would allow the Department to reconcile the sales in the electronic database to the deposits on the bank statement.

31. The Department determined that the Taxpayer's books and records were inadequate for audit and relied upon the "best information then available" of the Taxpayers' sales tax liability, in accordance with section 212.12(5)(b). The Taxpayer did not maintain sales invoices, sales journals, or general ledgers.

32. On August 8, 2011, the Department's auditor met with Mr. Gomez and discussed the audit findings regarding sales.

33. On August 18, 2011, the Department's auditor met with Mr. Gomez and discussed the taxability of the prepaid calling arrangements.

34. On October 31, 2011, the Department mailed the Taxpayer a Notice of Intent to Make Audit Changes, form DR-1215, for audit number 200105422.

35. Prior to issuing the DR-1215, the Department compromised in full the assessed penalty.

36. On February 16, 2012, the Department mailed the Taxpayer a Notice of Proposed Assessment for audit number 200105422. The Department assessed the Taxpayer \$102,508.28 in sales tax and interest through February 16, 2012, in the amount of \$18,097.52. Interest accrues at \$19.62 per day until the tax is paid in full.<sup>2/</sup>

ESTOPPEL

37. In its Amended Petition, the Taxpayer asserts that it "relied on advice and instruction from [the Department] when it failed to collect Telecommunication tax and should not be subject to any taxes or penalties as a result of their [sic] reasonable reliance."

38. Mr. Gomez and Ms. Niño made three visits to the Department's service centers, but only one of those three visits pre-dated the audit period. The other two visits were after the audit period.

39. In February 2001 they visited the service center in Miami, Florida, where they talked to someone named "Maria" about the taxability of their new business.

40. Both Mr. Gomez and Ms. Niño testified that as a result of the first visit with "Maria" in 2001, the Taxpayer only charged customers sales tax on the sales of flowers, gift



baskets, and other items of tangible personal property delivered in Florida. The owners testified that they relied on advice given to them by "Maria."

41. "Maria" did not testify at the formal hearing. There was no written confirmation of the advice given by "Maria."

42. After the audit period while the audit was ongoing (between August 8 and August 18, 2011) they visited the service center in Coral Springs, Florida, where they spoke to someone named "Paula" about the ongoing audit.

43. The third and final visit was on August 18, 2011, when they met with Everal Thomas at the service center in West Palm Beach. Mr. Thomas was the Department's auditor in this case. The owners talked to him about the taxability of the prepaid calling arrangements.

44. The Taxpayer timely filed its Amended Petition for Administrative Hearing. The Taxpayer continues to dispute the assessment.

#### CONCLUSIONS OF LAW

45. DOAH has jurisdiction over the subject matter of and the parties to this proceeding pursuant to sections 120.569, 120.57(1), and 212.18, Florida Statutes.

46. Section 212.06(2) defines the term "dealer." There is no dispute that the Taxpayer is a dealer within the meaning of that definition.

47. The Department is authorized to prescribe the books and records to be kept by all dealers that are subject to sales and use tax. § 212.12(6)(a), Fla. Stat. The Department is authorized to audit or inspect the books and records of dealers and, if a deficiency exists, to make an assessment and collect it. § 212.12(5)(a), Fla. Stat.

48. Pursuant to section 212.12(5)(b), if a dealer fails or refuses to make its records available for inspection so that no audit or examination has been made of the books and records, the Department has the affirmative duty to make an assessment of taxes due from an estimate based on the best information then available to it for the audit period, together with interest, plus penalty. The Department must collect such tax, interest, and penalty on the basis of such assessment, which shall be considered prima facie correct, and the burden to show the contrary rests upon the dealer.

49. The Department bears the initial burden to demonstrate that the assessment has been made against the Taxpayer, and the factual and legal grounds upon which the Department made the assessment. The Department met that burden in this proceeding. The burden shifted to the Taxpayer to demonstrate by a preponderance of the evidence that the assessment is incorrect. See IPC Sports, Inc. v. Dep't of Revenue, 829 So. 2d 330, 332 (Fla. 3d DCA 2002). The Taxpayer did not meet that burden.

50. Section 120.80(14)(b)2. pertains to taxpayer challenges to assessments made by the Department, and provides as follows:

2. In any such administrative proceeding, 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.

51. The Florida sales tax is an excise tax on the privilege of engaging in business in the state. The sales tax is not a tax on the property sold. §§ 212.05 and 212.06, Fla. Stat.

52. It is the legislative intent that every person is exercising a taxable privilege who engages in the business of selling items of tangible personal property at retail in this state. § 212.05, Fla. Stat. Florida Administrative Code Rule 12A-1.038(1) is clear that each sale is taxable unless such sale is specifically exempt.

53. A tax, at the rate of six percent of the sales price of each item of tangible personal property is levied on each taxable transaction when sold at retail in this state, computed on each taxable sale for the purpose of remitting the amount of tax due the state. § 212.05(1)(a)1.a., Fla. Stat.

54. Section 212.02 provides the following definitions:

15) "Sale" means and includes:  
(a) Any transfer of title or possession, or both, exchange, barter, license, lease, or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration. . . .

(16) "Sales price" means the total amount paid for tangible personal property, including any services that are a part of the sale, valued in money, whether paid in money or otherwise, and includes any amount for which credit is given to the purchaser by the seller, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service cost, interest charged, losses, or any other expense whatsoever.

\* \* \*

(19) "Tangible personal property" means and includes personal property which may be seen, weighed, measured, or touched or is in any manner perceptible to the senses . . . .

55. Section 212.05(1)(1) pertains to florists in Florida and provides as follows:

(1) Florists located in this state are liable for sales tax on sales to retail customers regardless of where or by whom the items sold are to be delivered. Florists located in this state are not liable for sales tax on payments received from other florists for items delivered to customers in this state.

56. Florida Administrative Code Rule 12A-1.047(1) and (2) pertain to florists in Florida and provide, in relevant part, as follows:

(1) Florists are engaged in the business of selling tangible personal property at retail and their sales of flowers, wreaths, bouquets, potted plants and other such items of tangible personal property are taxable.

(2) Where florists conduct transactions through a florists' telegraphic delivery association, the following rules will apply in the computation of the tax, which will be on the entire amount paid by the customer without any deductions whatsoever:

(a) On all orders taken by a Florida florist and telegraphed to a second florist in Florida for delivery in the state, the sending florist is held liable for the tax.

(b) In cases where a Florida florist receives an order pursuant to which he gives telegraphic instructions to a second florist located outside Florida for delivery of flowers to a point outside Florida, tax will likewise be owing with respect to the total receipts of the sending florist from the customer who places the order.

(c) In cases where Florida florists receive telegraphic instructions from other florists located either within or outside of Florida for delivery of flowers, the receiving florist will not be held liable for tax with respect to any receipts which he may realize from the transaction. In this instance, if the order originated in Florida, the tax will be due from and payable by the Florida florist who first received the order and gave telegraphic instructions to the second florist.

57. The Taxpayer asserts that it is not a florist within the meaning of section 212.05(1)(1) or rule 12A-1.047 because of the manner in which it fills the orders it receives. That assertion is rejected. The Taxpayer stipulated that it specializes in selling flowers and markets itself to the public as a company that sells flowers.

58. The Department construes the Taxpayer's activity to be that of a florist. Since the collection of sales and use tax from florists is based on statutes for whose administration the Department is responsible, the Department's interpretation of the statute and validly adopted rules related to the statute will not be disturbed unless the interpretation is clearly erroneous. See State Contracting and Eng'g Corp. v. Dep't of Transp., 709 So. 2d 607, 610 (Fla. 1st DCA 1988). From the general principle of deference follows the more specific principle that an agency's interpretation need not be the sole interpretation or even the most desirable one; it need only be within the range of permissible interpretations. See State Bd. of Optometry v. Fla. Soc. of Ophthalmology, 538 So. 2d 878, 885 (Fla. 1st DCA 1988) and Suddath Van Lines, Inc. v. Dep't of Env'tl. Prot., 668 So. 2d 209, 212 (Fla. 1st DCA 1996).

59. The Taxpayer's sale of flowers, wreaths, bouquets, potted plants, and other such items of tangible personal property were subject to sales tax pursuant to section 212.05.(1)(1) and rule 12A-1.047(1).

60. The undersigned rejects the Taxpayer's argument that rule 12A-1.047 does not apply to it because the Taxpayer does not communicate using the telegraph. It is apparent that the rule is illustrative, and was meant to apply to florists who communicate via telephone and Internet.

This conclusion is even more compelling in light of the very clear language of section 212.05(1)(1).

61. Florida also imposes sales tax at the rate of six percent on charges for prepaid calling arrangements pursuant to section 212.05(1)(e)1., which requires that the tax on charges for prepaid calling arrangements be collected at the time of the sale and remitted to the Department by the selling dealer. The term "prepaid calling arrangements" is defined by section 212.05(1)(e)1.a.(I) as follows:

(I) "Prepaid calling arrangement" means the separately stated retail sale by advance payment of communications services that consist exclusively of telephone calls originated by using an access number, authorization code, or other means that may be manually, electronically, or otherwise entered and that are sold in predetermined units or dollars whose number declines with use in a known amount.

62. The taxpayer stipulated that it specialized in the sale of prepaid calling arrangements within the meaning of the statutory definition and that it did not collect or remit sales taxes on those sales.

63. Section 212.054 authorizes Florida counties to impose a discretionary surtax on sales. In addition to the sales tax at the rate of six percent, the Taxpayer was also required to collect and remit any applicable surtax, and it was appropriate

for the auditor to factor in surtaxes in calculating the assessment.

64. The undersigned rejects the Taxpayer's contention that the doctrine of equitable estoppels prevents the Department from making the subject assessment. The court in Dep't of Revenue v. Anderson, 403 So. 2d 397, 400 (Fla. 1981), made the following observations as to the doctrine of equitable estoppels.

As a general rule, equitable estoppel will be applied against the state only in rare instances and under exceptional circumstances. . . . Another general rule is that the state cannot be estopped through mistaken statements of the law. . . . In order to demonstrate estoppel, the following elements must be shown: 1) a representation as to a material fact that is contrary to a later-asserted position; 2) reliance on that representation; and 3) a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon. . . .  
[Citations omitted.]

65. The elements necessary to constitute equitable estoppel have not been established in this proceeding.

#### 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 validates the assessment against American Business USA Corp.



DONE AND ENTERED this 27th day of February, 2013, in  
Tallahassee, Leon County, Florida.



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CLAUDE B. ARRINGTON  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 27th day of February, 2013.

ENDNOTES

<sup>1/</sup> Those numbers were set forth in paragraph 4 of the Joint Pre-Hearing Stipulation.

<sup>2/</sup> The Taxpayer asserts that it is not liable for sales taxes on the grounds discussed in this Recommended Order. The Taxpayer has not attacked the auditor's calculations of the sales taxes and interest due.

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.

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