

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF REVENUE,

Petitioner,

vs.

Case No. 14-2538

PNC LLC, d/b/a CHEAP,

Respondent.

_____ /

RECOMMENDED ORDER

On September 26, 2014, a final administrative hearing in this case was held by video teleconference at sites in Tallahassee and Tampa, Florida, before Linzie F. Bogan, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Angela Lynn Huston, Esquire
Office of the Attorney General
PL-01, The Capitol
Tallahassee, Florida 32399

For Respondent: William B. Meacham, Esquire
308 East Plymouth Street
Tampa, Florida 33603

STATEMENT OF THE ISSUE

Whether the Department of Revenue (Department or Petitioner) may revoke the certificate of registration issued to Respondent for failure to comply with the terms of a compliance agreement.

PRELIMINARY STATEMENT

The Department of Revenue seeks to revoke the certificate of registration issued to PNC LLC, d/b/a Cheap (Respondent). The Department entered into a compliance agreement with Respondent on July 10, 2013. The Department cancelled the compliance agreement on October 12, 2013, due to Respondent's failure to comply with the terms thereof. On or about March 6, 2014, the Department filed an Administrative Complaint against Respondent alleging that Respondent has a history of failing to abide by chapter 212, Florida Statutes. The Administrative Complaint also alleges that Respondent violated the compliance agreement by failing, for a period of several months, to file the required sales and use tax returns and remit the tax due. Respondent timely filed a request for formal administrative hearing. On May 29, 2014, the Department transmitted the case to the Division of Administrative Hearings (DOAH) for final hearing.

At the final hearing, the Department presented the testimony of its employees Mary Havens and Kimberly Ridgeway. Respondent presented testimony from Verna Bartlett. Department Exhibits 1 through 8 were admitted into evidence and the undersigned took official recognition of tax warrants recorded by the Department against Respondent in the Official Records of Hillsborough County, Florida. Respondent's Exhibits 1 through 16 were admitted into evidence.

A Transcript of the final hearing was filed with DOAH on October 7, 2014. The parties each submitted a Proposed Recommended Order. The Proposed Recommended Orders submitted by the parties have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Department is the state agency charged with administering and enforcing Florida's revenue laws, including the laws related to the imposition and collection of sales and use taxes pursuant to chapter 212, Florida Statutes (2013).^{1/}

2. Respondent is a Florida limited liability company doing business at 309 South Howard Avenue, Tampa, Florida, and is a "dealer" as defined at section 212.06(2).

3. Respondent holds a certificate of registration issued by the Department (Certificate No. 39-8015401140-8) and is statutorily required to file tax returns and remit taxes to the Department.

4. The Department is authorized to cancel a dealer's certificate of registration for failure to comply with state tax laws. Prior to such cancellation, the Department is required by statute to convene a conference with the dealer.

5. The Department initiated the process of revoking Respondent's certificate of registration by sending Respondent a Notice of Conference on Revocation of Certificate of Registration

(Notice of Conference) via regular mail and certified mail on May 24, 2013.

6. The Department then hand-delivered a copy of the Notice of Conference to Respondent's principal place of business on June 21, 2013.

7. The Notice of Conference advised that the informal conference would be held on June 26, 2013. The Notice of Conference also informed Respondent that revocation was being considered because of Respondent's failure to submit sales and use tax and reemployment tax. The notice further advised that at the informal conference Respondent would have the opportunity to make payment or present evidence to demonstrate why the Department should not revoke Respondent's certificate of revocation.

8. Verna Bartlett and Aubrey Grantham appeared on behalf of Respondent, at the informal conference.

9. Christopher Scott, Respondent's manager and registered agent, entered into a Compliance Agreement with the Department on July 10, 2013.

10. The compliance agreement states that, due to Respondent's failure to timely file returns and pay all taxes due, Respondent admits to a past due sales and use tax liability of \$43,586.23, consisting of tax, penalty, interest and fees. The compliance agreement also states that Respondent admits to a

past due reemployment tax liability of \$19,215.75, consisting of tax, penalty, interest and fees. The compliance agreement required Respondent to make a down payment of \$15,000 by July 10, 2013, to make, beginning on August 10, 2013, monthly payments in the amount of \$4,000 for one year, and to make a final balloon payment on July 10, 2014. The compliance agreement also provides that:

IN CONSIDERATION for the Department refraining from pursuing revocation proceedings at this time, the taxpayer agrees:

- A. To accurately complete all past due tax returns and reports and file them no later than 7/10/13.
- B. To remit all past due payments to the Department as stated in the attached payment agreement.
- C. To accurately complete and timely file all required tax returns and reports for the next 12 months, beginning with the first return/report due following the date of this agreement.
- D. To timely remit all taxes due for the next 12 months, following the date of this agreement.^{2/}

11. On July 10, 2013, Respondent made the down payment of \$15,000 as required by the compliance agreement.

12. Per the compliance agreement, all payments were to be made in certified funds, money order or cash and received by the

close of business on the due date at the Department's Tampa Service Center.

13. Per the compliance agreement, Respondent's second monthly payment in the amount of \$4,000 was due by the close of business on September 10, 2013. The Department, as part of the process associated with the execution and implementation of the compliance agreement, provided Respondent with "Stipulation Agreement Payment Coupons" (Stipulation Coupons) to facilitate the processing of Respondent's monthly payments. Although the compliance agreement indicates that payments are to be received by the close of business on the 10th calendar day of each month, the Stipulation Coupon for September 2013 showed that payment should be received "on or before September 12, 2013," at the "Tampa Service Center."

14. Both the compliance agreement and the Stipulation Coupon clearly indicate that payments are to be sent to the Tampa Service Center. Nevertheless, Respondent sent its payment, by check dated and mailed on September 12, 2013, to the Department's Tallahassee office.

15. Not only was the payment mailed to the incorrect address, but it was also untimely. Furthermore, because Respondent did not include a note on the memo portion of the check or enclose a Stipulation Coupon with the check, the Department applied the payment to a different account.

16. As a consequence of Respondent's failure to submit the September 2013 payment in a manner consistent with either the compliance agreement or the Stipulation Coupon, the Department wrote Respondent and informed the company that effective October 12, 2013, the compliance agreement was voided. The compliance agreement was never reinstated by the parties. Due to the compliance agreement having been voided, all monies owed for past due tax payments became due as of October 12, 2013. At some point after the filing of the Administrative Complaint, and prior to the final hearing, Petitioner satisfied all past due tax liabilities covered by the compliance agreement.

17. The Administrative Complaint alleges that "Respondent failed to file a tax return for the months of December 2013 and January 2014" which resulted in "an estimated tax liability of \$13,854.32."^{3/} Additionally, the Department, in its Proposed Recommended Order, argues that for the period July 2013 through July 2014 Respondent failed to electronically file returns and submit payment of sales and use tax and reemployment tax. According to the Department, Respondent's omissions violated the terms of the compliance agreement.

18. Respondent annually reports more than \$20,000 in sales and use tax.

19. For the months July and August 2013 (September is not included because the tax return and related payment were not due

until October 20, 2013, which is after the date of termination of the compliance agreement), the undisputed evidence is that Respondent did not electronically file its returns when due.^{4/} The evidence also established that Respondent did not seek, nor did the Department grant, a waiver authorizing Respondent to file its returns via non-electronic means. The evidence is inconclusive regarding whether Respondent has paid any amounts owed for these months.

20. The compliance agreement required Respondent "[t]o accurately complete . . . all required tax returns and reports." The compliance agreement does not define the word "accurately." The root word "accurate" is generally accepted to mean "conforming exactly to truth or to a standard." Accurate Definition, Merriam-Webster.com, <http://merriam-webster.com/dictionary/accurate> (last visited Oct. 31, 2014). There is nothing in the compliance agreement suggesting that the parties intended a different meaning for this term.

21. Section 213.755(1) and Florida Administrative Code Rule 12-24.003 establish the standard by which Respondent was to conduct itself and these provisions provide that any taxpayer that has paid tax in the prior state fiscal year in an amount of \$20,000 or more is required to file returns and remit payments by electronic means, unless first obtaining a waiver. By not filing its returns by electronic means, as required, Respondent did not

"accurately complete" the returns for July and August 2013 because the returns were not filed in accordance with "the standard" established by section 213.755 and Florida Administrative Code Rule 12-24.003. Respondent's failure in this regard was in violation of the then-in-effect compliance agreement.

22. The Department has issued and recorded against Respondent delinquent tax warrants and notices of lien in the public records of Hillsborough County, Florida, to secure collection of delinquent sales and use tax and reemployment tax liability, plus penalties, filing fees and interest. On April 6, 2013, the Department recorded against Respondent a tax warrant in the amount of \$10,323.40, and on May 15, 2013, another tax warrant in the amount of \$32,912.04 was also recorded. The tax liability, and related penalties, fees and interest for these two tax warrants were covered by the compliance agreement and have since been satisfied.^{5/}

CONCLUSIONS OF LAW

23. DOAH has jurisdiction over the subject matter and parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2014).

24. The Department has the burden of proving by clear and convincing evidence the allegations in the Administrative Complaint on which the Department relies to seek revocation of

Respondent's certificate of registration. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996). As stated by the Florida Supreme Court:

Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Henson, 913 So. 2d 579, 590 (Fla. 2005) (quoting Slomowitz v. Walker, 492 So. 2d 797, 800 (Fla. 4th DCA 1983)); accord Westinghouse Electric Corp. v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991) ("Although this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous.").

25. As a dealer, Respondent is required to, and did, obtain a certificate of registration from Petitioner. See § 212.18, Fla. Stat., and Fla. Admin. Code R. 12A-1.060.

26. Pursuant to section 212.18, the Department is authorized to revoke Respondent's certificate of registration due to Respondent's failure to timely file the required returns and remit sales tax due as required by chapter 212.

27. In accordance with section 212.15(1) and (2), the tax imposed pursuant to chapter 212 becomes state funds at the moment

of collection, and the intentional failure to remit these taxes constitutes theft of state funds.

28. Pursuant to section 212.15(1), tax is due on the first day of the succeeding calendar month and must be paid to the Department on or before the 20th of each month for tax collected the preceding calendar month.

29. Section 212.11(1)(b) requires Respondent to file tax returns with the Department on a monthly basis.

30. Section 212.15(1) requires that Respondent collect taxes from customers and remit such taxes to the Department on a monthly basis.

31. Section 212.18(3)(e) states that the Department may proceed to revoke a certificate after conducting a conference with a dealer and offering the dealer an opportunity to provide additional information or resolve the dispute through a compliance agreement. In the present case, such a conference occurred, and the parties agreed to resolve the matter through execution of a compliance agreement. Respondent failed to comply with the terms of the agreement which resulted in the Department unilaterally cancelling the agreement on October 12, 2013. Respondent has, however, paid all past due tax liabilities covered by the compliance agreement and this militates against revocation of Respondent's certificate of registration.

32. Section 213.692, Florida Statutes, specifically authorizes the Department to revoke a dealer's certificate of registration if the Department has filed a warrant against a dealer for the failure to file a tax return or to remit taxes. The evidence established that the Petitioner has filed multiple tax warrants against Respondent for failing to file tax returns or remit taxes. Only two of the warrants, as discussed in the Findings of Fact, are at issue in this proceeding. Respondent's tax liability covered by the two tax warrants at issue has been satisfied and this militates against revocation of Respondent's certificate of registration.

33. Any taxpayer that has paid tax in the prior state fiscal year in an amount of \$20,000 or more is required to file returns and remit payments by electronic means, unless first obtaining a waiver. See § 213.755, Fla. Stat.

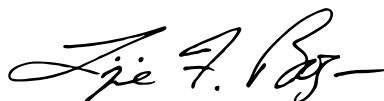
34. Returns required to be initiated through an electronic data exchange are not timely if they are not received by the 20th of each month for tax collected the preceding calendar month. See § 212.11(1)(e), Fla. Stat. The evidence established that Respondent failed to file returns by electronic means for the months of July and August 2013, and that Petitioner did not grant Respondent a waiver which authorized Respondent to use an alternative process for filing.

35. Section 213.755(6) provides that "[a] taxpayer who fails to file returns [electronically] is liable for a penalty of \$10 for each report submitted, which is in addition to any other penalty that may be applicable." It is unreasonable under the facts of this case to elevate what would otherwise be a \$20 fine into a revocation proceeding because Respondent failed to electronically file two tax returns while subject to a compliance agreement.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Revenue issue a final order that declines to revoke Dealer's Certificate of Registration No. 39-8015401140-8 held by PNC LLC, d/b/a Cheap.

DONE AND ENTERED this 3rd day of November, 2014, in Tallahassee, Leon County, Florida.



LINZIE F. BOGAN
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 3rd day of November, 2014.

ENDNOTES

^{1/} All subsequent references to Florida Statutes will be to 2013, unless otherwise indicated.

^{2/} The compliance agreement gives Respondent an opportunity to satisfy past due tax liabilities by entering into an installment payment plan. The compliance agreement also imposes on Respondent a prospective obligation to timely file and remit, for a period of 12 months from the date of the agreement, all tax returns, reports and taxes due. By imposing a 12-month prospective obligation on Respondent to timely file and remit tax returns and taxes due, the Department, with the consent of the Respondent, is by-passing the conciliation process set forth in sections 212.18 and 213.692, Florida Statutes, by making any breaches by Respondent during this 12-month period grounds for immediate revocation. Because the Department voided the compliance agreement on October 12, 2013, the Department cannot thereafter avail itself of the negotiated benefit of being able to by-pass the conciliation process for any alleged violation that occurred after the date upon which the Department voided the agreement. Therefore, any alleged violations occurring after October 12, 2013, are not properly before DOAH because the Department has neither alleged nor proved that the conciliation process provided for in sections 212.18 and 213.692, Florida Statutes, has occurred with respect to any such alleged violations. See generally, Jacksonville Entm't Co., LLC, v. Dep't of Rev., Case No. 11-4341 (Fla. DOAH Mar. 19, 2012; Fla. DOR July 9, 2012) (conciliation process must occur prior to the filing of an administrative complaint seeking to revoke a dealer's certificate of registration). The Department may issue an Administrative Complaint for alleged violations occurring after October 12, 2013, once the Department fully complies with the requirements of sections 212.18(3)(e) and 213.692(1)(a). Id.

^{3/} No findings of fact are made with respect to the period September 2013 through July 2014 because any alleged violations by Respondent during this period were not governed by the compliance agreement. See also, endnote 2.

^{4/} See endnotes 2 and 3.

^{5/} No findings of fact are made with respect to any tax warrants filed after the Department voided the compliance agreement. See endnote 2.

COPIES FURNISHED:

Verna Bartlett
Tampa Hyde Park Cafe, LLC
303 South Melville Avenue
Tampa, Florida 33606

Nancy L. Staff, General Counsel
Department of Revenue
Post Office Box 6668
Tallahassee, Florida 32314-6668
(eServed)

Angela Lynn Huston, Esquire
Office of the Attorney General
PL-01, The Capitol
Tallahassee, Florida 32399
(eServed)

William B. Meacham, Esquire
308 East Plymouth Street
Tampa, Florida 33603
(eServed)

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

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.