

STATE OF FLORIDA
DEPARTMENT OF REVENUE

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Petitioner,

vs.

PNC, LLC, d/b/a CHEAP,

Respondent.

DOR 2015-001 - FOF
FILED

Department of Revenue – Agency Clerk
Date Filed: *January 23, 2015*
By: *April Warner*

DOR Case No.: DOR-14-030 AC
DOAH Case No.: 14-2538

FINAL ORDER

This cause came before the State of Florida, Department of Revenue ("Department"), for the purpose of issuing a final order. On or about March 6, 2014, the Department issued an Administrative Complaint ("Complaint") against Respondent. A true and correct copy of the Complaint is attached hereto and incorporated herein by reference as Exhibit 1. The Complaint sought to revoke Respondent's certificate of registration, in accordance with Sections 212.18 and 213.692, Florida Statutes, due to Respondent's non-compliance with Chapter 212, Florida Statutes.

In response to the Complaint, Respondent elected a disputed fact hearing pursuant to Subsection 120.57(1), Florida Statutes, which was held on September 26, 2014. A true and correct copy of Respondent's request for hearing is attached hereto and incorporated herein by reference as Exhibit 2. The Division of Administrative Hearings (DOAH) issued its Recommended Order (Order) on November 3, 2014. A copy of the recommended order is attached hereto and incorporated herein by reference as Exhibit 3. On November 18, 2014, Petitioner filed its exceptions to the Recommended Order. A copy of Petitioner's Exceptions to Recommended Order (Exceptions) is attached hereto and incorporated by reference as Exhibit 4.

RULINGS ON EXCEPTIONS

On November 18, 2014 Petitioner filed its exceptions to the Order. Pursuant to subsection 120.57(1)(k), Florida Statutes, a Final Order issued as a result of a Recommended Order:

[S]hall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.

This statutory pleading requirement provides a three-prong threshold for exceptions to a recommended order that must be explicitly ruled upon in a Final Order. The Exceptions filed by Petitioner herein meet this three-prong threshold.

In addition, while Petitioner's first exception is related to a footnote, the second exception addresses the conclusion of law set forth in paragraph 35 of the Order. The standard for review of conclusions of law is that the agency must state with particularity its reasons for rejecting or modifying a conclusion of law and must make a finding that its substituted conclusion of law is as, or more, reasonable than that which was rejected or modified.

Exception Number One

Exception number one, which relates to Footnote Number Two in the Order, is granted, for the reasons set forth in the Exceptions, and in order to be consistent with the purposes and the mandates of sections 212.18 and 213.692, Florida Statutes. Upon determining that a dealer is not compliant with chapter 212, Florida Statutes, or that warrants or liens have been filed against a dealer's property for unpaid taxes, the Department is required to schedule an informal conference which the dealer is required to attend. If the dealer fails to attend the conference, fails to enter a compliance agreement, or fails to comply with the terms of a compliance agreement, the Department is required to issue an Administrative Complaint. To require the

Department to engage in a potentially perpetual cycle of conference-compliance agreement-breach-conference is not consistent with the statutory framework intended to correct a dealer's failure to comply with Florida law.

Further, a compliance agreement is a statutorily-controlled agreement between the Department and a non-compliant dealer. Specifically, in return for the Department's agreement to stay its revocation proceeding, the dealer agrees to remit the state tax monies collected from customers which the dealer converted to its own use, and to comply with Florida law going forward – both of which are legal obligations of the dealer regardless of whether a compliance agreement is executed. [Transcript pages 26, 28-29, 95, 169]

There was no bypass of the "conciliation" conference, rather, the statute dictates that conciliation must be the first step in the revocation process, and this step was not bypassed herein. The Administrative Law Judge's reliance upon *Jacksonville Entertainment Co., LLC, v. Florida Department of Revenue*, Case No. 11-4341 (Fla. DOAH Mar. 19, 2012; Fla. DOR July 9, 2012) is misplaced, as *Jacksonville Entertainment Co., LLC* was decided on the basis that the Department failed to file an Administrative Complaint following the dealer's failure to enter a compliance agreement at an informal conference. In the matter at hand, the informal conference was the first step in the process, as reflected in the Order at paragraphs 6 through 9, Exhibits D and E to the Administrative Complaint, and the transcript at pages 23 through 26 and 44. Where, as in the present case, the compliance agreement was deactivated or voided on a department computer system following failure of the dealer to comply with its terms, the Department is not relieved of the statutory obligation to proceed with the issuance of an Administrative Complaint based upon actual breach of the compliance agreement as a matter of law. The record is replete with competent evidence that the compliance agreement was breached by the Respondent. [Transcript pages 21-23, 27, 30-32, 42-43, 52-53, 57-59, 64-66, 68-69, 79, 85, 87-88, 92, 97-98, 106, 113-114, 117, 128, 133-135, 137-138, 141, 148, 157-158, 162-163, 168] For all of the foregoing reasons, this conclusion is more reasonable than that posited by the Administrative Law Judge in Footnote Number Two.

Exception Number Two

Exception number two, related to Paragraph Number 35 in the Order, is granted, for the reasons set forth in the Exceptions. The record clearly demonstrates penalties totaling \$4,793.49 as of March 3, 2014 applicable to the dealer's failure to file returns and remit taxes collected from customers as required by chapter 212, Florida Statutes. The Administrative Law Judge's narrow focus on just one type of penalty applicable to the failure to file electronically fails to account for the fact that the filings were also untimely and the tax, when remitted, was overdue. The March 3, 2014 worksheets that were attached to the Administrative Complaint issued March 6, 2014 reflect multiple periods of non-compliance immediately following execution of the compliance agreement. All of these violations of the requirements of chapter 212, Florida Statutes, result in penalties. Therefore, when read in conjunction with the findings in paragraphs 19 through 21 of the Order - that the Respondent did not file its returns as required by section 213.755, Florida Statutes, and Rule 12-24.003, Florida Administrative Code - it is clear that the Respondent did violate the compliance agreement entered during the informal conference. This is consistent with the conclusions in paragraphs 14-15, 19-21, 31 and 34 of the Order, and is supported by the testimony found at Transcript pages 53, 69, 73-74, 79, 83-84, 157, and 163, as well as Petitioner's Exhibit Number 8, and Respondent's Exhibits Numbered 10 and 14. Pursuant to subsections 212.18(3)(e) and 213.692(1)(a), Florida Statutes, as indicated in the foregoing ruling as to Exception One, the Department was required to file an Administrative Complaint once the Respondent breached the compliance agreement. For all of the foregoing reasons, this conclusion is more reasonable than that posited by the Administrative Law Judge in Paragraph 35.

FINDINGS OF FACT

The Department hereby adopts and incorporates by reference the findings of fact set forth in the recommended order as the factual findings herein, with the addition of two sentences to paragraph 18. Paragraph 18 shall read as follows:

18. Respondent annually reports more than \$20,000 in sales and use tax. However, Respondent converts sales tax collected from its customers to its own use, as documented by Finding of Fact Number 10, Petitioner's Exhibits Numbered 6 and 7, and Respondent's Exhibits Numbered 1 and 8, as well as Transcript pages 21-23, 25-26, 59, 70-71, 73-74, 77, 83-84, 95, 102-103, 110-111, 116, 119, 124-126, 144, 151-155, 159, 167-168, 172, 176, and 183-186. This finding, as modified, is supported by competent, substantial evidence in the record.

CONCLUSIONS OF LAW

The Department hereby adopts and incorporates by reference the conclusions of law set forth in the recommended order as the conclusions of law herein, as modified by the foregoing Rulings on Exceptions.

DETERMINATION

Although there is competent, substantial evidence to support revocation of the Respondent's Certificate of Registration, Respondent's account shall be reviewed with a focus upon any recent effort by the Respondent toward resolving its unpaid liabilities as well as Respondent's recent history of compliance with the filing and remittance requirements set forth in Chapters 212 and 443, Florida Statutes, in order to determine whether the Department must initiate an entirely new revocation proceeding in order to assist the Respondent in resolving its noncompliance with Florida Law.

NOTICE OF RIGHT TO JUDICIAL REVIEW

Any party who is adversely affected by this final order has the right to seek judicial review of the order under section 120.68, Florida Statutes, by filing a notice of appeal under Rule 9.190 of the Florida Rules of Appellate Procedure with the Agency Clerk of the Department of Revenue in the Office of the General Counsel, Post Office Box 6668, Tallahassee, Florida 32314-6668 [FAX (850) 488-7112], **AND** by filing a **copy** of the notice of appeal accompanied by the applicable filing fees with the District Court of Appeal, First District or with the District Court of Appeal in the appellate district where the party resides. **The notice of appeal must be filed within 30 days from the date this order is filed with the clerk of the Department.**

ENTERED in Tallahassee, Leon County, Florida, this 23rd day of January, 2015.

State of Florida
DEPARTMENT OF REVENUE

Andrea G. Moreland
Andrea Moreland
Deputy Executive Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Final Order has been filed in the official records of the Florida Department of Revenue and that a true and correct copy of the Final Order has been furnished by United States mail, both regular first class and certified mail return receipt requested, to Respondent at C/O William B. Meacham at 308 East Plymouth Street, Tampa, Florida 33603 this 23rd day of January, 2015.

Apie Warner
Agency Clerk