

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SALMA PETROLEUM, INC.,

Petitioner,

vs.

Case No. 14-3133

DEPARTMENT OF REVENUE,

Respondent.

_____/

GAUSIA PETROLEUM, INC.,

Petitioner,

vs.

Case No. 14-3134

DEPARTMENT OF REVENUE,

Respondent.

_____/

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted before Administrative Law Judge Mary Li Creasy by video teleconference at sites in Tallahassee and Lauderdale Lakes, Florida, on October 29, 2014.

APPEARANCES

For Petitioners: Zersis Minocher, pro se
12217 Northwest 35th Street
Coral Springs, Florida 33065

For Respondent: Carrol Y. Cherry, Esquire
Office of the Attorney General
Plaza Level 01, The Capitol
Revenue Litigation Bureau
Tallahassee, Florida 32399-1050

STATEMENT OF THE ISSUE

Whether Petitioners are liable for sales and use tax, penalty, and interest as assessed by the Department of Revenue (the Department)?

PRELIMINARY STATEMENT

These are consolidated cases involving the Department and audit assessments against two corporate taxpayers: Salma Petroleum, Inc. (Audit Number 200149872) (Salma), and Gausia Petroleum, Inc. (Audit Number 200149749) (Gausia). These cases were consolidated at hearing due to common witnesses, common exhibits (except for the figures), and similar testimony of the management of both taxpayers.

On March 6, 2014, the Department issued Petitioners each a Notice of Proposed Assessment (NOPA) assessing Salma additional sales and use tax in the sum of \$159,282.26, plus penalty, and interest. The Department assessed Gausia additional sales and use tax in the sum of \$213,754.46, plus penalty, and interest. Petitioners denied liability and requested formal hearings to contest the assessments.

The Department referred the cases to the Division of Administrative Hearings on July 9, 2014, and the matters were assigned to Administrative Law Judge D. R. Alexander. The final hearings were originally scheduled for October 14, 2014. Respondent's amended motions for continuance were granted on

August 13, 2014, and the final hearings were re-scheduled for October 29, 2014. The cases were transferred to the undersigned on October 17, 2014, and proceeded to final hearing as scheduled on October 29, 2014, at which time the cases were consolidated.

Petitioners called Arif Ahmed, manager of both entities, and submitted no exhibits.^{1/} Respondent called two witnesses: Ron Collier, Tax Audit Supervisor, and Richard Lawhon, Senior Tax Specialist with Compliance Campaigns. Respondent's Exhibits 1 through 8 pertaining to Salma, and Exhibits 1 through 8 pertaining to Gausia, were admitted.

Neither party ordered a transcript of the final hearing. Both parties timely submitted proposed recommended orders which were considered in the drafting of this Recommended Order.

Unless otherwise noted, all statutory references are to Florida Statutes (2013).

FINDINGS OF FACT

1. Salma is a Florida corporation with its principal place of business at 2231 Del Prado Boulevard, Cape Coral, Florida, 33990. Gausia is a Florida corporation with its principal place of business at 11571 Gladiolus Drive, Fort Myers, Florida, 33908.

2. Petitioners are in the business of operating gas stations with convenience stores.

3. The Department is an agency of the State of Florida and is authorized to administer the tax laws of the State of Florida.

4. Petitioners were selected for audit because their reported gross sales were less than the total cost of items purchased (inventory) for the audit period.

5. The Department issued Salma and Gausia each a Notice of Intent to Conduct a Limited Scope Audit or Self-Audit, dated April 26, 2013, for sales and use tax, for the period February 1, 2010, through January 31, 2013 (collectively referred to as the Notices).

6. The Notices requested that Petitioners provide the Department: (a) a list of all their vendors for alcohol, tobacco, soda, chips, candy, etc.; (b) their total purchases of alcohol and tobacco, by vendor, for the period July 2010 to June 2011; (c) copies of their federal tax returns for the examination period; (d) purchase receipts for all purchases for the last complete calendar month; and (e) daily register (Z tapes) for the last complete calendar month.

7. The Notices gave Petitioners 60 days to gather the requested documents before the audit was to commence. The Notices also requested that Petitioners complete an attached Questionnaire and Self Analysis Worksheet.

8. In response to the Notices, Petitioners requested a 30-day extension of time until July 18, 2013, to provide the requested documents and to designate a Power of Attorney.

9. Petitioners did not provide the Department any books and records for inspection, nor did they complete and return the questionnaire and self analysis worksheets. As a result, the Department's auditor determined the sales tax due based upon the best information available.

10. To calculate an estimated assessment of sales tax, the Department used the purchase data of Petitioners' wholesalers and distributors of alcoholic beverages and tobacco, for July 1, 2010, through June 30, 2011; the 2010 National Association of Convenience Stores average markups and in-store sales percentages of alcoholic beverage and tobacco products; and historical audit data.

11. After reviewing the purchase data for July 1, 2010, through June 30, 2011, and for July 1, 2011, through June 30, 2012, the Department's auditor determined that the data was missing a few vendors.

12. As a result, the Department's auditor estimated the amount of Petitioners' cigarette purchases, based on historical audit data that shows that cigarette sales are generally 4.31 times more than beer sales.

13. The Department's auditor and audit supervisor testified that the estimated gross sales seemed reasonable and consistent with the national averages and the purchase data for July 1, 2011, through June 30, 2012.

14. The Department estimated gross sales (i.e., the retail sale value of the goods sold) by marking up the taxable sales and exempt sales reported on the sales and use tax returns submitted to the Department by Petitioners.

15. For example, for July 1, 2010, through June 30, 2011, Salma purchased beer from its wholesalers and distributors for \$148,826.15, and the Department marked up the purchase price by 27 percent for a retail value of \$189,009.21.

16. For July 1, 2010, through June 30, 2011, Gausia purchased beer from its wholesalers and distributors for \$132,138.65, and the Department marked up the purchase price by 27 percent for a retail value of \$167,816.09.

17. The Department's markup on the alcoholic beverage and tobacco products is reasonable because the Department's auditor testified that he used a combination of 2010 National Association of Convenience Stores average markups and the competitive pricing and information from audits of other convenience stores.

18. The Department determined that the exemption ratio reported on the sales and use tax returns submitted to the Department by Petitioners was extremely high for their industry.

19. The Department used an exemption ratio of 15 percent, based on historical audit data for the industry, to calculate Petitioners' estimated taxable sales.

20. A review of Petitioners' sales and use tax returns revealed that they did not apply the tax bracket system to their taxable sales transactions, as required under sections 212.12(9) and (10), Florida Statutes.

21. Instead, Petitioners remitted sales tax on their taxable sales based on their gross receipts at a flat tax rate. The Department's auditor testified that this method of reporting tax is inappropriate and does not accurately reflect the sales activity of the business.

22. The Department calculated the average effective tax rate of 6.0856 percent, based on historical audit data for the industry.

23. To calculate the estimated tax due, the Department multiplied the effective tax rate by the estimated taxable sales and gave Petitioners credit for any tax remitted with their tax returns.

24. The Department issued Salma a Notice of Intent to Make Audit Changes, dated August 8, 2013, for audit number 200149872. The Department issued Gausia a Notice of Intent to Make Audit Changes, dated August 8, 2013, for audit number 200149749.

25. The Department assessed Petitioners sales tax on their sales of alcoholic beverages and tobacco.

26. The Notice of Intent to Make Audit Changes gave Petitioners 30 days to request a conference with the auditor or

audit supervisor, to dispute the proposed changes. Petitioners did not make such a request.

27. The Department issued a Notice of Proposed Assessment (NOPA) to Salma on March 6, 2014, for tax in the sum of \$159,282.26; for penalty in the sum of \$39,820.57; and interest as of March 6, 2013, in the sum of \$27,772.36.

28. The Department issued a NOPA to Gausia on March 6, 2014, for tax in the sum of \$213,754.46; for penalty in the sum of \$53,438.62; and interest as of March 6, 2013, in the sum of \$36,921.79.

29. Additional interest accrues at \$30.55 per day until the tax is paid.

30. The NOPAs became final assessments on May 5, 2014.

31. After filing a request for an administrative hearing, Petitioners completed the Questionnaire and Self Analysis Worksheet and produced the following documents to the Department:

- (a) a list of all of their vendors for alcohol, tobacco, soda, chips, candy, etc.;
- (b) a list of vendors for alcohol and tobacco, for the examination period of July 2010 to June 2011;
- (c) a summary of their taxable sales, for the period February 2010 through December 2012;
- (d) copies of their federal tax returns, for the tax years 2010 through 2013;
- (e) copies of its purchase receipts for the months of July 2013;

and (f) copies of their daily register (Z-tapes) for the month of July 2013.

32. The Department's auditor testified that aside from being untimely, the records and information provided by Petitioners during these proceedings were not reliable because Petitioners did not provide any source documents that would allow the Department to reconcile the reported figures and confirm the supplied information. In addition, the purchase receipts and Z-tapes were not relevant because they were from outside of the audit period.

33. The Z-tapes are also unreliable because the manager of the convenience store testified at the final hearing that employees purposely and routinely entered taxable sales into the cash registers as tax exempt sales.

34. Petitioners argue that the Department did not use the best information available when estimating the taxes due. Petitioners claim that because their businesses are combination gas station/convenience stores, the national data for standalone convenience stores is inapplicable. However, notably absent from Petitioners' testimony or evidence was any alternative data upon which the Department could have relied for more accurate estimates.^{2/}

CONCLUSIONS OF LAW

Jurisdiction

35. The Division of Administrative Hearings has jurisdiction over the subject matter and parties to this proceeding. § 120.57(1), Fla. Stat. (2014).

Sales and Use Tax Audits

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

37. The term "dealer" is defined as any person who leases or rents tangible personal property for a consideration, permitting the use or possession of such property without transferring title to the property. § 212.06(2)(e), Fla. Stat.

38. The Department is authorized to prescribe the books and records to be maintained by all dealers that are subject to sales and use tax. § 212.12(6)(a), Fla. Stat. Further, 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.

39. Dealers are required to keep suitable books and records relating to sales tax and to preserve those books and records. §§ 212.12(6)(a), 212.13, and 213.35, Fla. Stat.

40. For conducting an audit, only records and information available when the audit commences are deemed acceptable.

§ 212.13(5), Fla. Stat.

41. 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 from an estimate based upon the best information then available to it for the taxable period of retail sales, together with interest, plus penalty. § 212.12(5)(b), Fla. Stat. The Department must collect such taxes, 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. Id.

Respective Burdens

42. Florida tax law creates the presumption of correctness of the Department's assessment of tax, penalty, and interest. § 212.12(5)(b), Fla. Stat.

43. The Department has the initial burden to show that it made an assessment against Petitioner and that the assessment was valid and correct. IPC Sports, Inc. v. State, Dep't of Rev., 829 So. 2d 330, 332 (Fla. 3d DCA 2002); Dep't of Rev. v. Nu-Life Health & Fitness Ctr., 623 So. 2d 747, 751-52 (Fla. 1st DCA 1992); § 120.80(14)(b)2., Fla. Stat. Once the Department has met this burden, the burden shifts to Petitioner to prove by a

preponderance of the evidence that the assessment is incorrect.
Id.; § 120.57(1)(j), Fla. Stat.

Florida Sales and Use Tax

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

45. The tax imposed by the Florida sales and use tax law generally includes sales and use, admissions, transient rentals and commercial rentals taxes. §§ 212.05 & 212.06, Fla. Stat.

46. The Florida sales tax and use tax are separate, but complementary taxes, although they are often referred to as one tax. U.S. Gypsum v. Green, 110 So. 2d 409 (Fla. 1958).

47. 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., and Fla. Admin. Code R. 12A-1.038(1).

48. A tax, at the rate of six (6) 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, and including each and every retail sale. § 212.05(1)(a)1.a., Fla. Stat.

49. The Department made a prima facie showing of the validity of the respective assessments of sales tax, penalty, and interest against Petitioners. Petitioners have not presented any credible evidence to refute the methodology used by the Department in the performance of its audit.

50. In order to set aside the findings of the audit, Petitioners should have kept records that would have accurately identified the inventory and sales made at the gas stations/convenience stores. Petitioners kept no records to support their claim. The conclusions reached by the Department regarding the taxable sales, exempt sales, presumption of markup percentages, and tax rate are deemed reasonable.

51. Further, without information to show that Petitioners paid the statutory amount of sales tax on all their taxable sales, the Department had the duty to make an estimated assessment that included estimated taxable sales and average effective tax rate.

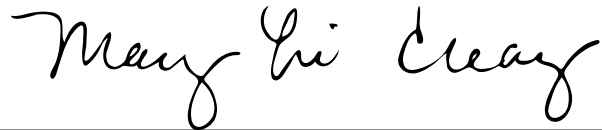
52. Petitioners had the duty to maintain records and make them available to the Department for audit. Petitioners may not now argue that their untimely produced, incomplete, and non-responsive records contradict the audit results.

53. Petitioners failed to overcome the presumption of correctness of the assessment by a preponderance of the evidence. Accordingly, the assessments are valid and correct.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Revenue enter a final order denying Petitioners' requests for relief and assessing, in full, the Department's assessments of sales tax, penalty, and interest against both Salma and Gausia.

DONE AND ENTERED this 9th day of January, 2015, in Tallahassee, Leon County, Florida.



MARY LI CREASY
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of January, 2015.

ENDNOTES

^{1/} Ahmed testified that he is the husband of the owner of both Gausia and Salma as well as the manager of the two establishments.

^{2/} Gausia also argued that the assessed tax is completely disproportionate to the inventory it carries and to the value of its business based upon the current listing of the business for sale. This testimony was not corroborated by admissible documents and was not persuasive. Gausia attached its business for sale listing and a monthly average balance sheet to its Proposed Recommended Order. However, these documents were not

considered because they were not identified as exhibits prior to the hearing, or admitted at the hearing.

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.