

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NATION AUTO SALES OF SOUTH
FLORIDA, INC.,

Petitioner,

vs.

Case No. 14-3136

DEPARTMENT OF REVENUE,

Respondent.

_____ /

RECOMMENDED ORDER

This case came before Administrative Law Judge Todd P. Resavage for final hearing by video teleconference on October 3, 2014, at sites in Tallahassee and Miami, Florida.

APPEARANCES

For Petitioner: Carrol Y. Cherry, Esquire
Department of Legal Affairs
PL-01, The Capitol
Revenue Litigation Bureau
Tallahassee, Florida 32399-1050

For Respondent: Ari Abecasis, pro se
Nation Auto Sales of South Florida, Inc.
12263 Northwest 49th Drive
Coral Springs, Florida 33076

STATEMENT OF THE ISSUE

Whether the Department of Revenue's ("Department") assessment of tax, penalty, and interest against Nation Auto Sales of South Florida, Inc., is valid and correct.

PRELIMINARY STATEMENT

On April 17, 2014, the Department issued a Notice of Final Assessment to Petitioner for \$192,501.80 in delinquent taxes, \$20,190.35 in penalties, and \$66,031.36 in interest, for the period of October 1, 2005, through March 31, 2010. On July 3, 2014, Petitioner requested an administrative hearing. The matter was referred to the Division of Administrative Hearings ("DOAH") for assignment of an Administrative Law Judge on July 9, 2014.

On August 6, 2014, the Department served Petitioner with its First Requests for Admission. Pursuant to notice, the final hearing was conducted on October 3, 2014. At hearing, the Department made an ore tenus motion to deem admitted the matters contained in its First Requests for Admission, as Petitioner had not served upon the Department written answers or objections to same. The motion was granted.

At hearing, the Department presented the testimony of Margaret "Peggy" Surles, Gweneth Watson, and Robert Taft, and introduced six exhibits. Arie Abecasis testified on behalf of Petitioner.

No transcript of the final hearing was ordered. The Department timely filed a Proposed Recommended Order and the same has been considered by the undersigned in issuing this Recommended Order.

Unless otherwise indicated, all rule and statutory references are to the 2014 versions.

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.

2. Petitioner, during the period of October 1, 2005, through March 31, 2010 ("assessment period"), was engaged in the business of selling used motor vehicles at retail in Broward County, Florida.^{1/}

3. Arie Abecasis was Petitioner's president and sole corporate officer.

4. Petitioner was continuously registered with the Department as a "dealer," pursuant to chapter 212, Florida Statutes.

5. Petitioner was continuously licensed by the State of Florida Department of Highway Safety and Motor Vehicles ("DMV") as an independent motor vehicle dealer, pursuant to chapter 320, Florida Statutes.

6. On September 3, 2008, the Department issued correspondence to Petitioner advising that the Criminal Investigations process had received a referral from the Department's collection sub process, concerning Petitioner's possible failure to remit all of the sales tax collected from its

customers. In order to determine if a discrepancy existed, the Department requested Petitioner to provide: (1) sales invoices/buyer's orders; (2) sales journals; (3) cash receipt and disbursement journal; (4) general ledger; and (5) bank statements for all depository accounts.

7. On September 9, 2008, Mr. Abecasis met with Robert Taft, a criminal investigator for the Department. Mr. Taft advised Mr. Abecasis that there were two areas of concern:

(1) Petitioner's failure to file returns and remit collected sales tax over several collection periods; and (2) that a comparison of the Department and DMV records appeared to reveal a substantial and repeated underreporting and under-remitting of collected sales tax. Mr. Abecasis advised that he would fully cooperate and provide records from 2005 on or before September 17, 2008.

8. Thereafter, Petitioner provided some 2005 records, which Mr. Taft compared with DMV records. After completing a review of the same, on November 7, 2008, Mr. Taft issued correspondence to Petitioner advising that Petitioner's license was used to transfer vehicles for which Petitioner had failed to provide documentation. The same records indicated sales tax collected but never remitted to the Department. Accordingly, Mr. Taft requested all of the documentation originally requested to be produced on or before December 5, 2008.

9. The Department did not receive the requested documentation. Thereafter, Mr. Taft obtained additional records from the DMV regarding a listing of all vehicles titled during the period from October 1, 2005, through March 31, 2010, using Petitioner's motor vehicle dealer's license numbers. Additionally, certified title applications for each of the title transfer transactions were reviewed.

10. From the documents obtained, the Department was able to determine the following information regarding vehicles sold by Petitioner: the acquisition month, dealer number, acquisition date, title number, owner's last name, vehicle make, vehicle body, vehicle ID, and tax credit.

11. The Department established that Petitioner filed with the Department Sales and Use Tax Returns, Form DR-15, that were not accompanied by payment of the tax due, for the following months: April through July, 2008; and February through August 2009.

12. The Department established that Petitioner did not file with the Department Sales and Use Tax Returns, Form DR-15, for February and March, 2010.

13. Petitioner collected at least \$810,063.15 in sales tax. Petitioner remitted to the Department \$509,735.53 in sales tax.

14. Petitioner failed to remit to the Department at least \$300,327.62 in sales tax collected from its customers.

15. On or about November 1, 2010, the Department referred the matter to the Office of the State Attorney for the Seventeenth Judicial Circuit of Florida for criminal prosecution. On October 31, 2012, in the case styled State v. Abecasis, Case No. 11-0002423 CF 10A, Mr. Abecasis entered a plea of no contest to the criminal charge of theft of state funds in an amount of \$20,000 or more, a second-degree felony. As a special condition of his probation, Mr. Abecasis was ordered to make restitution to the Department in the amount of \$50,000.00. It is undisputed that, on or before April 10, 2014, Petitioner satisfied the restitution ordered.

16. On April 17, 2014, the Department issued to Petitioner a Notice of Jeopardy Finding and a Notice of Final Assessment. The Notice of Final Assessment notified Petitioner that \$192,501.80 in tax, \$20,190.35 in penalty, and \$66,031.36 in interest were due.^{2/} The Notice of Jeopardy Finding averred that the Department found "one or more of the jeopardy conditions provided in Rule 12-21.005, Florida Administrative Code, which tend to prejudice or render wholly or partly ineffectual the normal conditions for collection of tax, penalty, or interest." The stated jeopardy condition was delay.

17. On April 21, 2014, the Department recorded a warrant for collection of delinquent sales and use tax against Petitioner in the amount contained in the Notice of Final Assessment.

18. Petitioner testified that, due to the nature of his business, it was a frequent occurrence that potential vehicle purchasers would require financing. Petitioner testified that it was Petitioner's practice to allow the customer to obtain the vehicle prior to financial approval from the lending institution. Accordingly, when the customer was not ultimately approved for financing or when the vehicle was repossessed, a true "sale" did not occur, and, therefore, sales taxes were not collected and remitted. The undersigned finds Petitioner's testimony not credible and not otherwise supported by the record evidence.

CONCLUSIONS OF LAW

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

20. The Department is the agency authorized to administer the tax laws of the State of Florida. §§ 20.21 and 213.05, Fla. Stat.

21. 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 and 212.06, Fla. Stat. As noted in section 212.05,

It is hereby declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this state, including the business

of making mail order sales, or who rents or furnishes any of the things or services taxable under this chapter, or who stores for use or consumption in this state any item or article of tangible personal property as defined herein and who leases or rents such property within the state.

(1) For the exercise of such privilege, a tax is levied on each taxable transaction or incident, which tax is due and payable as follows:

(a)1.a. At the rate of 6 percent of the sales price of each item or article of tangible personal property 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.

22. Section 212.02(15) defines "sale" to include "[a]ny 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."

23. Section 212.02(19) defines "tangible personal property," as follows:

"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, including electric power or energy, boats, motor vehicles and mobile homes as defined in s. 320.01(1) and (2), aircraft as defined in s. 330.27, and all other types of vehicles. The term "tangible personal property" does not include stocks, bonds, notes, insurance, or other obligations or securities or pari-

mutuel tickets sold or issued under the racing laws of the state.

24. Section 212.06 defines the term "dealer." There is no dispute that Petitioner is a dealer within the meaning of that definition. Every person who is engaged in business as a dealer under the sales and use tax provisions of chapter 212, Florida Statutes, must be registered by the Department to collect and remit tax. § 212.18, Fla. Stat.

25. The Department is authorized to prescribe the records to be kept by all dealers that are subject to sales and use tax. § 212.12(6)(a), Fla. Stat. Section 212.12(5) addresses the Department's authorization to conduct audits and the consequence of a dealer's failure to make records available:

(5)(a) The department is authorized to audit or inspect the records and accounts of dealers defined herein, including audits or inspections of dealers who make mail order sales to the extent permitted by another state, and to correct by credit any overpayment of tax, and, in the event of a deficiency, an assessment shall be made and collected. No administrative finding of fact is necessary prior to the assessment of any tax deficiency.

(b) In the event any dealer or other person charged herein fails or refuses to make his or her records available for inspection so that no audit or examination has been made of the books and records of such dealer or person, fails or refuses to register as a dealer, fails to make a report and pay the tax as provided by this chapter, makes a grossly incorrect report or makes a report that is false or fraudulent, then, in such

event, it shall be the duty of the department to make an assessment from an estimate based upon the best information then available to it for the taxable period of retail sales of such dealer, the gross proceeds from rentals, the total admissions received, amounts received from leases of tangible personal property by such dealer, or of the cost price of all articles of tangible personal property imported by the dealer for use or consumption or distribution or storage to be used or consumed in this state, or of the sales or cost price of all services the sale or use of which is taxable under this chapter, together with interest, plus penalty, if such have accrued, as the case may be. Then the department shall proceed to 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 shall rest upon the dealer, seller, owner, or lessor, as the case may be.

26. The Department bears the initial burden to demonstrate that the assessment has been made against Petitioner, and the factual and legal grounds upon which the Department made the assessment. The burden then shifts to Petitioner 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); § 120.80(14)(b)2, Fla. Stat.

27. Here, the Department met its burden. Petitioner failed to make its records available for inspection, as requested. The Department properly discharged its duty to make an assessment (the Notice of Final Assessment), and proceeded to collect the

taxes, interest, and penalty on the basis of the assessment, which is considered prima facie correct.

28. Petitioner contends the assessment is incorrect on the grounds that the restitution paid, pursuant to the plea agreement, satisfies any amounts outstanding to the Department. Section 775.089(8), Florida Statutes, negates Petitioner's argument and provides as follows:

The conviction of a defendant for an offense involving the act giving rise to restitution under this section shall estop the defendant from denying the essential allegations of that offense in any subsequent civil proceeding. An order of restitution hereunder will not bar any subsequent civil remedy or recovery, but the amount of such restitution shall be set off against any subsequent independent civil recovery.

29. Here, Petitioner paid the Department \$50,000 in restitution. The Department presented unrefuted evidence that, in calculating the Notice of Final Assessment, Petitioner was given credit for the \$50,000 paid in restitution.

30. Additionally, no evidence was presented to support the conclusion that the \$50,000 paid by Petitioner as part of the court ordered restitution would constitute a closing agreement or compromise pursuant to section 213.21, Florida Statutes.

31. Petitioner also contends that the assessment is incorrect because the amounts alleged are based on car sales that were cancelled or resulted in repossessions of vehicles, and

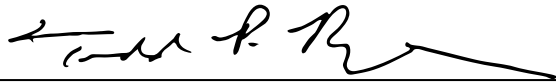
yielded no profits to Petitioner which would be taxable as a sale. Petitioner failed to present sufficient evidence to support this contention. Petitioner failed to establish by a preponderance of the evidence that the assessment is incorrect.

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 Nation Auto Sales of South Florida, Inc.

DONE AND ENTERED this 26th day of November, 2014, in Tallahassee, Leon County, Florida.



TODD P. RESAVAGE
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 26th day of November, 2014.

ENDNOTES

^{1/} The findings of fact refer to the assessment period, unless otherwise indicated.

^{2/} The record fails to disclose to the undersigned the sequence of events that transpired to explain the reduction of taxes owed from \$300,327.62 to \$192,501.80 (exclusive of penalties and interest).

COPIES FURNISHED:

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

Carrol Y. Cherry, Esquire
Department of Legal Affairs
Office of the Attorney General
PL-01, The Capitol
Revenue Litigation Bureau
Tallahassee, Florida 32399-1050
(eServed)

Ari Abecasis
Nation Auto Sales of South Florida, Inc.
12263 Northwest 49th Drive
Coral Springs, Florida 33076

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.