STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF REVENUE,

Petitioner,

vs. Case No. 14-4647

TAMPA HYDE PARK CAFE, d/b/a
THE HYDE PARK CAFE,

Respondent.
_____/

RECOMMENDED ORDER

This case was heard on March 4, 2015, by video teleconferencing at sites in Tallahassee and Tampa, Florida, before D.R. Alexander, the assigned Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Angela Lynn Huston, Esquire
Office of the Attorney General
Revenue Litigation Bureau
PL-01, The Capitol
Tallahassee, Florida 32399-1050

For Respondent: William Bart Meacham, Esquire
308 East Plymouth Street
Tampa, Florida 33603-5957

STATEMENT OF THE ISSUE

The issue is whether Respondent's Certificate of Registration 39-8011930243-9 should be revoked for the reasons stated in an Administrative Complaint for Revocation of

Certificate of Registration (Administrative Complaint) issued by the Department of Revenue (Department) on June 5, 2014.

PRELIMINARY STATEMENT

The Administrative Complaint proposes to permanently revoke Respondent's Certificate of Registration for failing to remit taxes, interest, penalties, and fees as required by chapters 212 and 443, Florida Statutes (2014). Raising a number of alleged procedural irregularities in the process, Respondent timely requested a hearing, and the matter was transmitted by the Department to DOAH to conduct a formal hearing.

At the final hearing, the Department presented the testimony of one witness. Department Exhibits 1-7 were accepted in evidence. Respondent presented the testimony of one witness. Respondent's Exhibits 1-8 were accepted in evidence.

A Transcript of the hearing has been prepared. The parties filed proposed recommended orders (PROs), which 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 the state revenue laws, including the laws related to the imposition and collection of sales and use taxes pursuant to chapter 212.

2. Respondent is a Florida limited liability corporation doing business as The Hyde Park Cafe at 1806 West Platt Street,

Tampa, Florida. For purposes of collecting and remitting sales and use taxes, it is a dealer as defined in section 212.06(2) and is required to comply with chapter 212.

3. Respondent holds Certificate of Registration number 39-8011930243-9, which became effective on July 27, 2000. A certificate of registration is required in order to do business in the state and requires its holder to collect and remit sales tax pursuant to chapter 212. See § 212.05(1), Fla. Stat.

4. Respondent is also an employing unit as defined in section 443.036(20) and is subject to the unemployment compensation tax (UCT) provisions of chapter 443, as provided in section 443.1215. Through an interagency agreement with the Department of Economic Opportunity, the Department provides collection services for UCTs. See § 443.1316(1), Fla. Stat. In doing so, the Department is considered to be administering a revenue law of the state. See § 443.1316(2), Fla. Stat.

5. A dealer must file with the Department sales tax returns and remit the tax collected on a monthly basis. See § 212.15(1), Fla. Stat. Also, an employment unit must remit payment to the Department for UCTs due and owing on a quarterly basis.

6. The Department is authorized to revoke a dealer's certificate of registration for failure to comply with state tax laws. See § 212.18(3)(e), Fla. Stat. If the Department files a

warrant, notice of lien, or judgment lien certificate against the property of a dealer, it may also revoke a certificate of registration. See § 213.692(1), Fla. Stat.

7. Before revoking a certificate of registration, the Department must convene an informal conference that the dealer is required to attend. See § 213.692(1)(a), Fla. Stat. At the conference, the dealer may either present evidence to refute the Department's allegations of noncompliance or enter into a compliance agreement with the Department to resolve the dealer's failure to comply with chapter 212. Id. After a compliance agreement is executed by the dealer, the Department may revoke the certificate of registration if the dealer fails to comply with its terms and conditions. See Pet'r Ex. 6, p. 2, ¶ E. If a breach occurs, the entire amount is due and payable immediately. Id. at ¶ G.

8. An informal conference can be characterized as the Department's last administrative remedy to collect delinquent taxes before beginning revocation proceedings. A dealer can also enter into a diversion program with the State Attorney's Office to resolve liabilities, but the record shows that Respondent defaulted on that arrangement. According to the Department, collection problems with this dealer first began in 2003.

9. Department records show that Respondent failed to remit required sales taxes for the months of January 2012, August through December 2012, January through December 2013, and January and February 2014. In addition, Respondent failed to remit UCTs for the calendar quarters ending September 2010, December 2010, March 2011, June 2011, September 2011, December 2011, March 2012, June 2012, September 2012, December 2012, and March 2013. Respondent does not dispute that it failed to timely remit and pay the foregoing taxes for the time periods listed above.

10. For the purpose of collecting the delinquent taxes, the Department issued and filed against Respondent delinquent tax warrants, notices of lien, or judgment lien certificates in the Hillsborough County public records. See Pet'r Ex. 3.

11. Before seeking revocation of Respondent's certificate of registration, on February 5, 2014, the Department's Tampa Service Center served on Respondent a Notice of Conference on Revocation of Certificate of Registration (Notice). See Pet'r Ex. 4. The Notice scheduled an informal conference on March 21, 2014. It listed 16 periods of sales and use tax noncompliance and 11 periods of re-employment tax noncompliance and provided the total tax liability as of that date. This number was necessarily fluid, as the taxes owed were accruing interest, penalties, and/or fees on a daily basis.

12. The purpose of the informal conference was to give Respondent a final opportunity to make full payment of all delinquent taxes, or to demonstrate why the Department should not revoke its Certificate of Registration. As pointed out by the Department, an informal conference allows a dealer to bring up "any concerns" that it has regarding its obligations.

13. Respondent's manager and registered agent, Christopher Scott, appeared at the conference on behalf of Respondent.[1/] At the meeting, he acknowledged that the dealer had not timely paid the taxes listed in the Notice and that the money was used instead to keep the business afloat. However, Mr. Scott presented paperwork representing that sales and use tax returns and payments for the months of November 2013 through February 2014 had just been filed online, and checks in the amount of $8,101.41 and $9,493.99 were recently sent to Tallahassee.

14. It takes 24 hours for online payments to show up in the system, and even more time for checks to be processed in Tallahassee. Accordingly, the Department agreed that Mr. Scott could have a few more days before signing a compliance agreement. This would allow the Department to verify that the payments were posted and recalculate the amount of taxes still owed. Also, before entering a compliance agreement, Respondent was required to make a down payment of around $20,000.00. Mr. Scott had insufficient cash, and a delay of a few days would

hopefully allow him to secure the necessary money for a down payment.

15. When none of the payments had posted by March 25, 2014, the Department calculated a total liability of $113,448.13, consisting of sales and use taxes and UCTs, penalties, interest, and fees. As of that date, none of the taxes listed in Finding of Fact 9 had been paid.

16. On March 25, 2014, Respondent's controller, who did not attend the informal conference, sent an email to the Department requesting a breakdown on the new tax liability. In response to her request, the Department faxed a copy of the requested information. See Resp. Ex. 4. After getting this information, the controller continued to take the position that the Department's calculations overstate Respondent's tax liability.

17. On March 31, 2014, Mr. Scott signed the compliance agreement. See Pet'r Ex. 6. Despite the controller testifying that she did not agree with the numbers, no question was raised by Mr. Scott when he signed the agreement. By then, the check in the amount of $8,101.41 had cleared and been credited to Respondent's account. Along with other funds, it was used towards the down payment of $20,000.00. The record does not show the status of the other payments that Mr. Scott claimed were mailed or filed online prior to the informal conference;

however, on March 31, 2014, except for the one check, none had yet posted.

18. The compliance agreement required scheduled payments for 12 months, with the final payment, a balloon payment in an undisclosed amount, being subject to renegotiation in the last month. Payments one and two were $1,500.00, while payments three through 11 were $2,900.00. The compliance agreement reflected a balance owed of $95,887.36, consisting of $60,504.34 in sales taxes and $35,347.02 in UCTs.[2/]

19. In return for the Department refraining from pursuing revocation proceedings, the compliance agreement required Respondent to "remit all past due amounts to the Department as stated in the attached payment agreement," "accurately complete and timely file all required tax returns and reports for the next 12 months," and "timely remit all taxes due for the next 12 months." Pet'r Ex. 1, p. 1. In other words, the compliance agreement addressed both delinquent taxes and current taxes that would be due during the following 12-month period, and it required that both categories of taxes be timely paid in the manner prescribed by the agreement.

20. To summarize the salient points of the agreement, all taxes were to be timely paid; delinquent taxes were to be paid by certified check, money order, or cash and were to be mailed or hand delivered to the Tampa Service Center and not

Tallahassee; and while not specifically addressed in the agreement, the dealer was instructed to pay all current obligations electronically, as required by law. Otherwise, Respondent was in violation of the compliance agreement.

21. A Payment Agreement Schedule for past due taxes was incorporated into the compliance agreement and provided that the first payment was due April 30, 2014, payable to: Florida Department of Revenue, Tampa Service Center, 6302 East Dr. Martin Luther King, Jr. Boulevard, Suite 100, Tampa, Florida 33619. Payments 2 through 12 were to be mailed or hand delivered to the same address. This meant, with no ambiguity, that money should not be sent to Tallahassee. There is no credible evidence that these instructions were misunderstood.

22. Unless a waiver is granted, Respondent is required by statute and rule to electronically file sales and use tax returns and UCT reports. See § 213.755, Fla. Stat.; Fla. Admin. Code R. 12-24.009 (where a taxpayer has paid its taxes in the prior state fiscal year in an amount of $20,000.00 or more, subsequent payments shall be made electronically). No waivers have been approved. In 2003, the Department notified Respondent of these requirements and Respondent complied with this directive until 2009. For reasons not disclosed, in 2009 Respondent voluntarily quit filing electronically. The record is silent on why this was allowed.[3/] In any event, at the

informal conference, Mr. Scott was specifically told that all current returns, reports, and taxes must be filed electronically, and not by mail, and that no money should be sent to Tallahassee. There is no credible evidence that he misunderstood these instructions.

23. In its PRO, Respondent correctly points out that the requirement to file current returns electronically was not specifically addressed in the compliance agreement. This is because the compliance agreement does not set forth every statutory and rule requirement that applies to a dealer. If this amount of detail were required, a dealer could ignore any otherwise applicable rule or statute not found in the compliance agreement. This contention has no merit.

24. Respondent failed to electronically file the current sales and use tax return and payment for the month of March 2014, due no later than April 21, 2014. Instead, it sent a paper check, which was returned by the bank for insufficient funds. This constituted a breach of the compliance agreement.

25. Despite repeated instructions on how and where to pay the delinquent taxes, payment 1, due on April 30, 2014, was paid by regular check and sent to Tallahassee, rather than the Tampa office. This contravened the compliance agreement. When payment was not timely received by the Tampa Service Center, Respondent was told that a check must be delivered to the Tampa

office by May 9. Respondent hand delivered a second check, this one certified, to the Tampa Service Center on May 9, 2014, or after the April 30 due date. The second check was treated as payment 1.

26. Respondent points out that on May 7 the Tampa Service Center granted its request for an extension of time until May 9 in which to deliver the certified check. While this is true, the extension was allowed in an effort to "work with" the Respondent on the condition that the account would be brought current by that date; otherwise, revocation proceedings would begin. Even if the extra ten days is construed as a grace period for payment 1, there were other violations of the compliance agreement set forth below.

27. Payment 2 for delinquent taxes, due on May 30, 2014, was paid by regular check and sent by mail to Tallahassee rather than the Tampa Service Center.[4/] This contravened the compliance agreement.

28. After the May 30, 2014 payment, Respondent made no further payments pursuant to the Payment Agreement Schedule. This constituted a violation of the compliance agreement.

29. Respondent did not remit payment with its current sales and use return for the month of August 2014. This contravened the compliance agreement.

30. Respondent did not file any current sales and use tax returns or remit payment for the months of July 2014 or September through January 2015. This contravened the compliance agreement.

31. Beginning in March 2014, Respondent filed current reemployment tax returns and payments using the incorrect tax rate on every return. This delayed their processing and resulted in penalties being imposed. In addition, even though Respondent was repeatedly told that such returns must be filed electronically, none were filed in that manner, as required by statute and rule. This contravened the compliance agreement.

32. In its PRO, Respondent contends the compliance agreement cannot be enforced because there was no "meeting of the minds" by the parties on all essential terms of the agreement. Specifically, it argues that the total amount of taxes owed was still in dispute -- the dealer contended that it owed $23,000.00 less than was shown in the agreement; the Payment Schedule Agreement did not specify the amount of the final balloon payment; the compliance agreement failed to state when payments are due if the due date falls on a weekend or holiday; the compliance agreement did not specify how the dealer's payments would be allocated between UCTs and sales and use taxes; and the compliance agreement failed to address the issue of filing electronically. Although some of these issues

were not raised in the parties' Joint Pre-hearing Stipulation, or even addressed by testimony at hearing, they are all found to be without merit for the reasons expressed below.

33. First, Mr. Scott did not dispute the amount of taxes owed when he signed the agreement, and he brought no evidence to the conference to support a different amount. Second, as explained to Mr. Scott at the informal conference, the precise amount of the balloon payment can only be established in the 12th month. This is because the exact amount depends on the dealer's compliance with the agreement over the preceding 11 months, and the amount of interest, penalties, and/or other fees that may have accrued during the preceding year. Third, there is no evidence that the dealer was confused when a due date for a payment fell on a weekend or holiday. Even if it was confused, reference to section 212.11(1)(e) and (f) would answer this question. Fourth, there is no statute or rule that requires the Department to specify how the delinquent payments are allocated. Moreover, neither Mr. Scott nor the controller requested that such an allocation be incorporated into the agreement before it was signed. Finally, the issue of filing electronically already has been addressed in Finding of Fact 22 and Endnote 3.

34. At hearing, Respondent's controller testified that she was out of town when the conference was held, suggesting that

Mr. Scott, who is not an accountant, was at a disadvantage when he attended the informal conference. However, Respondent had six weeks' notice before the conference, and there is no evidence that Respondent requested that the meeting be rescheduled to a more convenient day. Also, Respondent does not dispute that Mr. Scott was authorized to represent its interests at the conference, or that he could have been briefed by the controller before attending the informal conference or signing the compliance agreement. See also Endnote 1. Notably, at hearing, the controller testified that she "was involved in actually negotiating the agreement both before and after it was actually signed" even though she did not attend the conference. Tr. at 89.

35. Respondent also contends that after the Department considered the compliance agreement to be breached, the dealer had no further obligation to make payments pursuant to the agreement or state law until the parties negotiated a new agreement. Aside from Respondent's failure to cite any authority to support this proposition, nothing in the compliance agreement comports with this assertion. To the contrary, the compliance agreement specifically provides that if a breach occurs, the entire tax liability becomes due immediately. See Pet'r Ex. 6, p. 2, ¶ G. Thus, Respondent is obligated to pay the entire tax liability, which now exceeds $200,000.00.

36. All other arguments raised by Respondent have been carefully considered and are rejected as being without merit.

CONCLUSIONS OF LAW

37. 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. See Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996).

38. A compliance agreement is a statutorily-controlled agreement between the Department and the non-compliant dealer. 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. See Fla. Dep't. of Rev. v. PNC, LLC, Case No. 14-2538, 2015 Fla. Div. Adm. Hear. LEXIS 29 at *4 (Fla. DOAH Nov. 3, 2014; Fla. DOR Jan. 23, 2015). If a dealer fails to comply with the terms of a compliance agreement, the Department is required to issue an administrative complaint. Id. See also § 212.18(3)(e), Fla. Stat. (the Department shall issue an administrative complaint if the dealer fails to comply with the executed compliance agreement).

39. Section 212.18(3) 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. Here, a conference occurred, and the parties agreed to resolve the matter through the execution of a compliance agreement. By clear and convincing evidence, the Department has shown that Respondent failed to comply with the terms of the agreement.

40. In summary, Respondent violated the compliance agreement, and its Certificate of Registration should be revoked.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department of Revenue enter a final order revoking Respondent's Certificate of Registration 39-8011930243-9.

DONE AND ENTERED this 11th day of June, 2015, in Tallahassee, Leon County, Florida.

D. R. ALEXANDER
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 11th day of June, 2015.

ENDNOTES

[1/] Mr. Scott is no stranger to this process. He has participated in at least one other informal conference for another business he managed and/or owned.

[2/] A Department witness explained that the difference between the taxes owed on the March 25 breakdown ($113,448.13) and the amount shown in the compliance agreement ($95,887.36) was due to a deduction of delinquent taxes that were then in the diversion program with the State Attorney. See Tr. at 44. The dealer contends that the amount owed on March 31 was only around $73,000.00. On this issue, the Department's calculations have been accepted.

[3/] Respondent contends that it voluntarily stopped filing returns and payments electronically in 2009, and it had no obligation to continue do so. As the record shows, however, a dealer can cease filing electronically only if it began filing electronically on a voluntary basis. There is no evidence that this was the case. A fair inference from the evidence is that Respondent was required by law to file electronically in 2003, and without an approved waiver, which was never granted, it cannot voluntarily cease that practice.

[4/] The $1,500.00 check mailed to Tallahassee as payment 1 was cashed and the funds retained by the Department; however, they were not treated as satisfying payment 1. Instead, the second check correctly hand delivered on May 9 to the Tampa Service Center was treated as payment 1. The dealer argues that because the funds from the first check were retained by the Department, that money should be treated as payment 2, due on May 30. By then, however, the compliance agreement had been breached, and the entire amount was due. Presumably, that money has been applied to Respondent's outstanding liability. By sending a check to the wrong location, the dealer is responsible for this confusion.

COPIES FURNISHED:

Angela Lynn Huston, Esquire
Office of the Attorney General
Revenue Litigation Bureau
PL-01, The Capitol
Tallahassee, Florida 32399-1050
(eServed)

William Bart Meacham, Esquire
308 East Plymouth Street
Tampa, Florida 33603-5957
(eServed)

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

Marshall C. 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 of the date of this Recommended Order of Dismissal. Any exceptions to this Recommended Order of Dismissal should be filed with the agency that will render a final order in this matter.