STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

130 NE 40TH STREET, LLC, d/b/a
MICHAEL'S GENUINE FOOD AND
DRINK,

Petitioner,

vs. Case No. 16-6333

DEPARTMENT OF REVENUE,

Respondent.
_____/

RECOMMENDED ORDER

On March 30, 2017, Administrative Law Judge Lisa Shearer Nelson conducted a hearing pursuant to section 120.57(1), Florida Statutes (2016), by video-teleconferencing with sites in Tallahassee and Lauderdale Lakes, Florida.

APPEARANCES

For Petitioner: Joseph C. Moffa, Esquire
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For Respondent: Ryann E. White, Esquire
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STATEMENT OF THE ISSUES

The issues to be determined in this proceeding are 1) whether Respondent, the Department of Revenue (Respondent or the Department), demonstrated that it made an assessment against the taxpayer, as well as the factual and legal basis for the assessment; 2) whether Petitioner, 130 NE 40th Street, LLC, d/b/a Michael's Genuine Food and Drink (Petitioner or Michael's), is entitled to enterprise zone job credits (EZ credits) claimed on its sales and use tax returns for the audited period; and 3) whether the penalty and interest assessed in the August 18, 2016, Notice of Decision is justified.

PRELIMINARY STATEMENT

Petitioner is challenging Respondent's assessment of sales and use taxes against Petitioner as a result of an audit for the period beginning February 1, 2012, through January 31, 2015. This challenge addresses the propriety of the Department's disallowance of EZ credits taken by Petitioner during the audit period.

On August 18, 2016, Respondent issued a Notice of Decision advising that Petitioner owed a total of $215,421.26 in assessed taxes, penalties and interest through that date. On October 14, 2016, Petitioner filed a request for a hearing, and on October 28, 2016, the case was forwarded to the Division of

Administrative Hearings (Division) for assignment of an administrative law judge.

The case was originally scheduled for hearing on January 31, 2017. At Petitioner's request, it was rescheduled for March 30, 2017, and commenced and concluded on that day. Petitioner presented the testimony of Omar Azze, and Petitioner's Exhibits numbered 1 through 21, and lettered A and B, were admitted into evidence. Respondent presented the testimony of Robert Ward, Suzanne Haines, and Kathleen Marsh, and Respondent's Exhibits numbered 1 through 12 were admitted. The parties filed a Joint Pre-hearing Stipulation that contained stipulated findings of fact that have been incorporated into the findings below. The Transcript of the hearing was filed with the Division on April 13, 2017, and at the parties' request, proposed recommended orders were due 30 days after the filing of the Transcript. Both parties' Proposed Recommended Orders were timely filed, and have been considered in this Recommended Order. All references to Florida Statutes are to the codification in effect during the audit period, i.e. 2012 through 2014.

FINDINGS OF FACT

1. Petitioner is a Florida corporation with its home office and principal place of business in Miami, Florida.

2. Respondent is an agency of the State of Florida, charged with administering the state's sales tax laws under chapter 212, Florida Statutes (2012-2014).

3. Michael's is a limited liability company located at 130 NE 40th Street, Miami, Florida 33137. It operates a restaurant and bar at that address.

Business Structure of Michael's

4. Michael's opened in 2007 and is located in an enterprise zone in Miami. Michael's enterprise zone identification number is 1301.

5. Michael's is owned by Michael Schwartz. In 2012, Mr. Schwartz opened a second restaurant known as Harry's Pizzeria, which is also located in Miami. A third restaurant, the Cypress Room, was also opened during the audit period, although the timing of its opening is not clear from the record. Neither Harry's Pizzeria nor the Cypress Room is the subject of this audit.

6. All of the restaurants are separate legal entities. Mr. Schwartz is also the owner of a shared service company named Genuine Hospitality Group (GHG). The direct employees of GHG are the comptroller for the restaurants, the director of beverage, the director of operations, a marketing person, and the people overseeing the various restaurants. GHG does not have ownership in any of the restaurants, but provides services to each of them,

including at different times, payroll, marketing, operations, and menu development. For example, during the years 2012 and 2013, GHG provided payroll functions for the various restaurants. According to Omar Azze, GHG's comptroller, the idea was to create a "common paymaster" for the restaurants, because it would allow them to have a larger pool of employees for health insurance, in order to get a more favorable rate.

7. When Michael's decided to use this payroll method, Mr. Azze called the Department and canceled the reemployment tax registration of Michael's because the taxes would be paid through GHG. Contrary to notations in the Department's records, Michael's never closed during the audit period: it still had the same employees and management team. The idea for using a common paymaster approach for the restaurants came from the restaurants' accounting consultant. Paying employees through GHG was never intended to reduce the tax liability of Michael's, or to transfer control of the employees to GHG, and taxes related to payroll were all paid through GHG for 2012 and 2013. Each restaurant maintained control over its own employees (general manager, two or three assistant managers, the head chef, bussers, waiters, cooks, support staff, and bartenders) and employee records, and employees did not "float" from restaurant to restaurant. GHG would pay the employees for Michael's and the other restaurants, and all of the restaurants would reimburse GHG for the payroll

payments for their respective employees. Mr. Azze's testimony regarding this arrangement is consistent with the deductions on the restaurants' respective federal tax returns for the payrolls in 2012 and 2013, and is credited.

8. It is found that, during the calendar years 2012 and 2013, the employees remained under the direction and control of Michael's and that payroll services alone were handled by GHG.

9. In 2014, the third year of the audit period, the Petitioner decided to stop having GHG performing payroll functions, and to handle payroll in-house using a QuickBooks program, in order to reduce costs. In terms of the audit, this change in payroll method meant that for the first two years of the audit, all of the employees for Michael's were paid through GHG, as were all of Michael's' reemployment taxes. The third year of the audit, employees and reemployment taxes were paid through Michael's directly.

Applications for EZ Credits for Michael's

10. Section 212.096 allows certain eligible businesses within identified "enterprise zones" to take a credit against sales and use taxes when there are employees hired who live within the identified enterprise zones and when there has been an increase in jobs over the 12 months prior to the date of the application. Section 212.096(1)(a) defines an "eligible business" as "any sole proprietorship, firm, partnership,

corporation, bank, savings association, estate, trust, business trust, receiver, syndicate, or other group or combination, or successor business, located in an enterprise zone."

11. In order to obtain the credit, an eligible business must file an application, including a statement made under oath that includes, for each new employee, the employee's name and place of residence; the enterprise zone number for the zone in which the new employee lives; the name and address of the eligible business; the starting salary or hourly wages paid to the new employee; and a demonstration to the Department that, on the date of the application, the total number of full-time jobs is greater than it was 12 months prior to the application.

12. The application is initially filed with the governing body or enterprise zone development agency, which reviews the application and determines whether it contains all of the required information and meets the requirements of section 212.096. If it does, then the enterprise zone coordinator certifies the application and transmits it to the Department. In addition, the business also forwards a certified application to the Department.

13. Once the Department receives a certified application for enterprise zone credits, it has ten days to notify the business that the credit has been approved. If the application is incomplete or insufficient to support the credit, the

Department is required to deny the credit and notify the business, which is free to reapply.

14. Section 212.096(2)(a) provides that "[u]pon an affirmative showing . . . that the requirements of this section have been met, the business shall be allowed a credit against the tax remitted under this chapter." The credit "shall be allowed for up to 24 consecutive months, beginning with the first tax return due pursuant to s. 212.11 after approval by the department." § 212.096(2)(b), Fla. Stat.

15. Petitioner regularly submitted applications for EZ credits, and during the audit period, submitted applications on the following dates: February 1, 2012; August 1, 2012; February 4, 2013; April 2, 2013; July 19, 2013; August 15, 2013; August 30, 2013; January 6, 2014; January 30, 2014; March 3, 2014; March 27, 2014; and June 17, 2014. Each of these applications was made listing Michael's as the taxpayer.

16. Petitioner used a company named Economic Development Consultants (EDC) to help it calculate the credits Michael's would be entitled to claim. Each month, Petitioner provided to EDC the names of employees terminated or resigned and those newly hired, along with the new hires' addresses. Petitioner would also provide to EDC the number of full-time employees for each month. In determining residency for its employees, Petitioner relied on the addresses received from employees when they were

hired. EDC would then provide a report saying which employees qualified for a credit, and do the necessary paperwork in order to obtain approvals for the credits.

17. Each of Petitioner's applications for EZ credits submitted during the audit period was approved, and Petitioner took the EZ credits associated with those applications with the understanding that they were properly approved.

18. At the time the Department approved each of the applications for EZ credits, it had access to the information in and attached to the applications, including the identities of employees eligible for the credits. What the Department did not have when it reviewed the applications would be the actual wages paid to the eligible employees, because most of those wages would not have been paid at that point.

Actions Taken By the Auditor

19. On February 27, 2015, the Department issued a Notice of Intent to Audit Books and Records to Michael's, indicating that it would be subject to audit for the period February 1, 2012, through January 31, 2015.

20. Robert Ward was the auditor assigned to conduct the audit. Mr. Ward was relatively new to the Department, and had not previously conducted an audit that involved EZ credits.

21. As part of his audit preparation, Mr. Ward pulled a copy of the Department's standard audit plan, as well as the

Department's audit plan specifications for the industry in question (here, the restaurant industry). He noted that Michael's had been audited previously and that the current audit resulted from a "lead," but could not recall the basis or substance of the lead. He also noted that EZ credits had been an issue in the previous audit, which spanned the period from March 1, 2007, through June 30, 2009.

22. Mr. Ward conducted a pre-audit interview with Omar Azze, Petitioner's comptroller, on May 1, 2015.[1/] While there was an agenda prepared for this pre-audit meeting, it does not appear to be in the record. At this pre-audit meeting, Mr. Ward was focused on the routine aspects of the audit as opposed to EZ credits. The issue of EZ credits was first raised in a meeting with Mr. Azze and Mr. Schwartz on May 27, 2015. At that time, Mr. Ward advised that EZ credits would be disallowed because the employees for whom credits were taken were on the payroll of GHG as opposed to Michael's. Mr. Ward stated at hearing that this decision was made not based upon additional information, but based upon the sharing of employees by different entities.

23. Mr. Ward acknowledged that Michael's had received approval to take EZ credits, and that Michael's provided all of the documentation requested of it. He had sought guidance from his trainer, Michelle Samuels, and a senior revenue consultant, Miguel Suarez. Mr. Ward was advised to verify the validity of

the EZ credits claimed, with the focus on the growth of full-time employment.

24. If a company subject to an audit had not received an approval letter for the credits, then the credits would be disallowed automatically. If there was an approval letter (as there was here), Mr. Ward understood that he was to look at the application itself and review the information provided with the application, including the schedules filed with the application, in order to validate the use of the EZ credits.

25. Mr. Ward acknowledged that the person who reviewed the application for the Department when it was approved had all of this information. He was advised that the turn-around period for the initial applications was short, and that the initial reviewer is not required to validate the information, because the reviewer would trust the accuracy of the affirmation required of the taxpayer. The initial approval did not mean that the Department would not later go back and reexamine the information originally submitted.

26. In addition to the documents submitted with the applications, Mr. Ward considered other Department records, such as reemployment tax records. He also verified addresses for named employees in the applications using the DAVID database of the Department of Highway Safety and Motor Vehicles. The DAVID database maintains information related to drivers' licenses and

car registrations. The information in the DAVID database is not available to the general public, and was not available to Petitioner. Mr. Ward also acknowledged that people can have a different mailing address from their residential address for a variety of reasons, and they were not always consistent, even in the DAVID database.[2/] For example, one of the employees listed by Petitioner on an application dated August 1, 2012, was Aleksandar Gjurovski. The DAVID records indicate that on July 20, 2013, Mr. Gjurovski changed his mailing address. However, his residential address was not changed in the DAVID system until a date after the filing of the enterprise zone application. Mr. Ward relied on the change in the mailing address alone to determine that Mr. Gjurovski did not live within the enterprise zone at the time of the application. It is found that, at the time of the application, Mr. Gjurovski lived in the enterprise zone.

27. After consultation with his supervisors, Mr. Ward disallowed all of the EZ credits for 2012 and 2013, as well as some of the credits for 2014.

28. Respondent issued Michael's a Notice of Intent to Make Audit Changes dated November 10, 2015, for audit number 200180508. The reasons given in the Explanation of Items included in the Work Papers are initially listed by employee, as opposed to by date. For all of the employees for which credits

were claimed for 2012 and 2013, the primary reason stated by Mr. Ward is that the employees for which EZ credits were claimed were not employees of Michael's, but instead were employees of another company. If the application for EZ credits was filed during 2012 or 2013, but the credits were claimed past December 2013, all of the credits related to that employee were disallowed.

29. Other reasons listed for disallowing the tax credits were that there was no demonstrated job growth (for employees Kates, Gibson, Lopez, Jackson-Thompson, Daniels, Bradbury, Allante, Alicea, Wallace, and Herget); that the employee for which the credit was claimed did not live in the enterprise zone (for employees Coleman, Albert, Gjurovski, and Lopez); and discrepancies in terms of when employment ended compared to dates credits were claimed, or whether appropriate amount of credit was claimed for wages paid (for employees Kates, Poinsetti, Gomez, Daniels, Bradbury, Williams, Allante, and Herget). The first two of these reasons were based upon Mr. Ward's verification of the information provided in the EZ credit applications.

30. With respect to those employees for whom credits were disallowed because they had left the employ of Michael's, Petitioner introduced a letter from the Department's tax specialist, Suzanne Paul. The letter stated that a company could claim credits up to three months after employment ended in order

to recapture the three months of employment required prior to submitting an application for that employee. Mr. Ward was not aware of this letter at the time he performed the audit, and had he known, it would have changed his note, at least as to Mr. Gjurovski, concerning that basis for disallowing the credit.

31. Respondent assessed Michael's sales and use tax for disallowed EZ credits, for untaxed purchases of fixed assets, and for untaxed consumable purchases. Only the assessment related to disallowed EZ credits is challenged in this proceeding.

32. The Notice of Intent to Make Audit changes included a penalty of $62,609.01. In the letter accompanying the notice, Mr. Ward informed Petitioner that the penalty for items assessed in Exhibit B01 had been adjusted based on the reasonable cause guidelines outlined in Florida Administrative Code Rule 12-13.007. It appears that there was no adjustment or compromise of penalties associated with the disallowance of EZ credits.

33. Mr. Ward testified that penalties were assessed in this case because EZ credits were also an issue in the prior audit for Michael's. The payroll arrangement at issue in this case was not at issue in the prior audit, however, as it did not begin until 2012. The financial dealings of Michael's, including the payment of taxes to the Department, were also under a new comptroller, who was not involved in the first audit. Lastly, while the Department found fault with EZ credits in the first audit, it

compromised the taxes assessed for the same amount as those associated with the EZ credits. Mr. Ward acknowledged that, under the circumstances related to this audit, the penalty seemed harsh.

34. The Department issued a Notice of Proposed Assessment (NOPA) on December 15, 2015, in which it assessed taxes in the amount of $127,243.77, penalties of $62,609.01, and interest as of December 15, 2015, of $19,605.03.

35. Michael's filed an informal protest of the proposed assessment with the Department by means of a letter dated February 5, 2016.

36. On August 18, 2016, the Department issued a Notice of Decision that sustained the proposed assessment against Michael's in full. The Notice of Decision, which is, by its terms, the Department's final position in this matter, only addresses the issue of whether Michael's is an eligible employer for the purpose of receiving EZ credits.

CONCLUSIONS OF LAW

37. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. §§ 72.011(1)(a), 120.569, 120.57(1), and 120.80(14)(b), Fla. Stat. (2016).

38. Petitioner is challenging the Department's assessment of sales and use taxes, penalties, and interest. In this type of

proceeding, the Department bears the initial burden of demonstrating that an assessment has been made against the taxpayer, and the factual and legal grounds for making the assessment. The burden then shifts to Petitioner to demonstrate by a preponderance of the evidence that the assessment is incorrect. § 120.80(14)(b)2., Fla. Stat.; IPC Sports, Inc. v. Dep't of Rev., 829 So. 2d 330, 332 (Fla. 3d DCA 2002).

The Statutory Framework

39. The crux of this case deals with the interplay between three different statutes administered by the Department: sections 212.096, 212.11(5)(a), and 213.34. Section 212.096 specifically authorizes EZ job credits and prescribes the process required to obtain them, while section 212.11 describes the process for filing tax returns. Section 213.34 provides to the Department its general authority to audit tax returns.

40. Section 212.096 provides, in pertinent part:

> (1) For the purposes of the credit provided in this section:
> (a) "Eligible business" means any sole proprietorship, firm, partnership, corporation, bank, savings association, estate, trust, business trust, receiver, syndicate, or other group or combination, or successor business, located in an enterprise zone. The business must demonstrate to the department that, on the date of application, the total number of full-time jobs defined under paragraph (d) is greater than the total was 12 months prior to that date.
>
> * * *

(c) "New employee" means a person residing in an enterprise zone or a participant in the welfare transition program who begins employment with an eligible business after July 1, 1995, and who has not been previously employed full time within the preceding 12 months by the eligible business, or a successor eligible business, claiming the credit allowed by this section.
(d) "Job" means a full-time position, as consistent with terms used by the Department of Economic Opportunity and the United States Department of Labor for purposes of reemployment assistance tax administration and employment estimation resulting directly from a business operation in this state. This term does not include a temporary construction job involved with the construction of facilities or any job that has previously been included in any application for tax credits under s. 220.181(1). The term also includes employment of an employee leased from an employee leasing company licensed under chapter 468 if such employee has been continuously leased to the employer for an average of at least 36 hours per week for more than 6 months.
(e) "New job has been created" means that, on the date of application, the total number of full-time jobs is greater than the total was 12 months prior to that date, as demonstrated to the department by a business located in the enterprise zone.
A person shall be deemed to be employed if the person performs duties in connection with the operations of the business on a regular, full-time basis, provided the person is performing such duties for an average of at least 36 hours per week each month. The person must be performing such duties at a business site located in the enterprise zone.
(2)(a) Upon an affirmative showing by an eligible business to the satisfaction of the department that the requirements of this section have been met, the business shall be

allowed a credit against the tax remitted under this chapter.

(b) The credit shall be computed as 20 percent of the actual monthly wages paid in this state to each new employee hired when a new job has been created, unless the business is located within a rural enterprise zone pursuant to s. 290.004, in which case the credit shall be 30 percent of the actual monthly wages paid. If no less than 20 percent of the employees of the business are residents of an enterprise zone, excluding temporary and part-time employees, the credit shall be computed as 30 percent of the actual monthly wages paid in this state to each new employee hired when a new job has been created, unless the business is located within a rural enterprise zone, in which case the credit shall be 45 percent of the actual monthly wages paid. If the new employee hired when a new job is created is a participant in the welfare transition program, the following credit shall be a percent of the actual monthly wages paid: 40 percent for $4 above the hourly federal minimum wage rate; 41 percent for $5 above the hourly federal minimum wage rate; 42 percent for $6 above the hourly federal minimum wage rate; 43 percent for $7 above the hourly federal minimum wage rate; and 44 percent for $8 above the hourly federal minimum wage rate. For purposes of this paragraph, monthly wages shall be computed as one-twelfth of the expected annual wages paid to such employee. The amount paid as wages to a new employee is the compensation paid to such employee that is subject to reemployment assistance tax. The credit shall be allowed for up to 24 consecutive months, beginning with the first tax return due pursuant to s. 212.11 after approval by the department.

(3) In order to claim this credit, an eligible business must file under oath with the governing body or enterprise zone development agency having jurisdiction over the enterprise zone where the business is

located, as applicable, a statement which includes:

(a) For each new employee for whom this credit is claimed, the employee's name and place of residence, including the identifying number assigned pursuant to s. 290.0065 to the enterprise zone in which the employee resides if the new employee is a person residing in an enterprise zone, and, if applicable, documentation that the employee is a welfare transition program participant.

(b) If applicable, the name and address of each permanent employee of the business, including, for each employee who is a resident of an enterprise zone, the identifying number assigned pursuant to s. 290.0065 to the enterprise zone in which the employee resides.

(c) The name and address of the eligible business.

(d) The starting salary or hourly wages paid to the new employee.

(e) Demonstration to the department that, on the date of application, the total number of full-time jobs defined under paragraph (1)(d) is greater than the total was 12 months prior to that date.

(f) The identifying number assigned pursuant to s. 290.0065 to the enterprise zone in which the business is located.

(g) Whether the business is a small business as defined by s. 288.703(6).

(h) Within 10 working days after receipt of an application, the governing body or enterprise zone development agency shall review the application to determine if it contains all the information required pursuant to this subsection and meets the criteria set out in this section. The governing body or agency shall certify all applications that contain the information required pursuant to this subsection and meet the criteria set out in this section as eligible to receive a credit. If applicable, the governing body or agency shall also certify if 20 percent of the employees of the business are residents of an enterprise zone,

> excluding temporary and part-time employees. The certification shall be in writing, and a copy of the certification shall be transmitted to the executive director of the Department of Revenue. The business shall be responsible for forwarding a certified application to the department within the time specified in paragraph (i).
> (i) All applications for a credit pursuant to this section must be submitted to the department within 6 months after the new employee is hired, except applications for credit for leased employees. Applications for credit for leased employees must be submitted to the department within 7 months after the employee is leased.
> (4) Within 10 working days after receipt of a completed application for a credit authorized in this section, the department shall inform the business that the application has been approved. The credit may be taken on the first return due after receipt of approval from the department.
> (5) In the event the application is incomplete or insufficient to support the credit authorized in this section, the department shall deny the credit and notify the business of that fact. The business may reapply for this credit.
> (emphasis added)

41. Section 212.11 deals with the filing of tax returns. With respect to credits claimed on tax returns, it states:

> (5)(a) Each dealer that claims any credits granted in this chapter against that dealer's sales and use tax liabilities shall submit to the department, upon request, documentation that provides all of the information required to verify the dealer's entitlement to such credits, excluding credits authorized pursuant to the provisions of s. 212.17. All information must be broken down as prescribed by the department and shall be submitted in a manner that enables the department to verify that the credits are allowable by law. With

> respect to any credit that is granted in the form of a refund of previously paid taxes, supporting documentation must be provided with the application for refund and the penalty provisions of paragraph (c) do not apply.
> (b) The department shall adopt rules regarding the forms and documentation required to verify credits against sales and use tax liabilities and the format in which documentation is to be submitted.

42. The Department has adopted a rule which specifies a form to be used with respect to enterprise zone job credits. The form, DR-15ZC, is the form used when submitting the application described in section 212.096. Fla. Admin. Code R. 12A-1.097(5)(h).

43. Section 213.34 provides the Department's auditing authority. It states:

> (1) The Department of Revenue shall have the authority to audit and examine the accounts, books, or records of all persons who are subject to a revenue law made applicable to this chapter, or otherwise placed under the control and administration of the department, for the purpose of ascertaining the correctness of any return which has been filed or payment which has been made, or for the purpose of making a return where none has been made.
> (2) The department, or its duly authorized agents, may inspect such books and records necessary to ascertain a taxpayer's compliance with the revenue laws of this state, provided that the department's power to make an assessment or grant a refund has not terminated under s. 95.091(3).
> (3) The department may correct by credit or refund any overpayment of tax, penalty, or interest revealed by an audit and shall make

> assessment of any deficiency in tax, penalty, or interest determined to be due.
> (4) Notwithstanding the provisions of s. 215.26, the department shall offset the overpayment of any tax during an audit period against a deficiency of any tax, penalty, or interest determined to be due during the same audit period.

Angler Resorts and Epic Hotel

44. The issues to be resolved are whether the Department is entitled to revisit its approval of Petitioner's applications for EZ credits, what entity or entities constitute the employer for purposes of claiming the EZ credits, and whether the employees for which GHG provided payroll services are employees of GHG or of Michael's.

45. Petitioner has consistently asserted that the Department is not permitted to require documentation beyond what a taxpayer has already submitted, and is not permitted to reexamine its original decision to approve enterprise zone tax credits. Petitioner bases much of its argument on orders rendered in Angler Resorts, LLC v. Department of Revenue, Final Order No. DOR-08-17-FOI (Fla. DOR Mar. 16, 2008) (available from the agency clerk), and the Recommended Order in Epic Hotel, LLC v. Department of Revenue, Case No. 10-1679 (Fla. DOAH Aug. 2, 2010; Fla. DOR Jan. 11, 2011).

46. In Angler Resorts, the petitioner filed refund claims for merchandise purchased for a business property located in an

enterprise zone pursuant to section 212.08(5)(h). The Department requested information that exceeded the documentation identified in the Department's rule, in its review of Angler Resorts' claim regarding the number of employees Angler Resorts employed in the enterprise zone, and Angler Resorts declined to provide the additional information. The claims were granted in part and denied in part, and Angler Resorts requested a hearing pursuant to section 120.57(2).

47. In its Final Order, the Department determined that it had provided guidelines regarding what was necessary to show qualification for the exemption/refund, and included those guidelines in Forms EZ-E and DR-26S, incorporated into the Department's rule 12A-1.107(3). These guidelines did not include the information requested by the Notice of Intent to Make Tax Refund Claim Changes, and given the specific nature of the certification process in section 212.08(5)(h), the Department found that the claim for refund should not have been denied for failure to provide the additional requested information.

48. Epic Hotel also dealt with a request for refund pursuant to section 212.08(5), albeit under paragraph (5)(g). In Epic Hotel, the taxpayer applied for a refund for the cost of building materials used for the rehabilitation of real property located in an enterprise zone. The Department requested additional information, including a copy of Epic Hotel's federal

unemployment tax return and a copy of its W3 form. The auditor assigned to review the refund application also performed independent research on the employee issue, by using the state's unemployment tax records and DBPR's employee leasing company registration data, and was unable to locate evidence that the employees listed were employed by Epic Hotels.[3/] Epic Hotel sought a hearing pursuant to section 120.57(1) on the Department's denial of Epic Hotel's refund request. Administrative Law Judge John Newton issued a Recommended Order finding that, based upon the holding in Angler Resorts, Epic Hotel did not have to provide additional information about the residence and number of employees as certified by the enterprise zone coordinator. In its Final Order, the Department determined that while the holding in Angler Resorts provided that the taxpayer should not have been required to provide additional information, the Department was free to consider information obtained from other sources. The Final Order in its substituted conclusions of law also relied on Mercedes Lighting and Electric Supply, Inc. v. Department of General Services, 560 So. 2d 272, 278 (Fla. 1st DCA 1990) for the premise that the doctrine of stare decisis is "contrary to both the spirit and purpose of chapter 120 proceedings."

49. It is noted that, since the Mercedes Lighting decision, appellate courts have acknowledged that stare decisis does in

fact apply in administrative proceedings. Bethesda Healthcare Sys. v. Ag. for Health Care Admin., 945 So. 2d 574, 576-577 (Fla. 4th DCA 2006); Nordheim v. Dep't of Envtl. Prot., 719 So. 2d 1212, 1214 (Fla. 3d DCA 1998)(PERC abused its discretion in failing to consider its prior precedent, because its decision was inconsistent with officially stated agency policy or a prior agency practice, in violation of section 120.68(6)(e)3.); Gessler v. Dep't of Bus. & Prof'l Reg., 627 So. 2d 501, 503 (Fla. 4th DCA 1993) ("It appears the legislature has made a policy decision that the judicial concept of stare decisis should apply to administrative proceedings by requiring the agency to provide reasonable access to prior agency orders."). The concept is built into the standards of review for administrative proceedings in section 120.68(6). Nonetheless, it is reasonable for an agency to consider a prior decision to be distinguishable when either the facts or the law are different from those presented in the prior action.

50. Here, the Department considered both Angler Resorts and Epic Hotel to be distinguishable because both dealt with requests for refunds pursuant to section 212.08, while Michael's involves an application for credits pursuant to section 212.096. While there are similarities in the two statutes, there are decided differences. However, those differences do not make Angler

Resorts and Epic Hotel immaterial, as the Department contends, but rather, more compelling.

Requests for Refunds Versus Applications for Job Credits

51. First, the process outlined in section 212.08(5)(g) and (h), while similar, provides that a taxpayer files an application with the governing body or enterprise zone agency, and lists the information that the statute requires to establish the basis for a refund. However, unlike the provision in section 212.096, once the application is certified by the enterprise zone development agency, the next step in the process is for the Department to review the application and process the refund, which is the stage at which both Angler Resorts and Epic Hotel were decided. See § 212.08(5)(g)5. and 212.08(5)(h)5., Fla. Stat.

52. This case does not present in the same posture. Section 212.096(4) and (5), unlike section 212.08(5)(g) and (h), expressly provides a ten-day window for the Department to examine the application for enterprise zone job credits once the enterprise zone coordinator has reviewed the application, and requires the Department to either approve or deny the application once it has determined whether the application is incomplete or insufficient to support the credit sought. This ten-day window is meant for more than what the enterprise zone coordinator has already done. Section 212.096(2)(a) specifies that "[u]pon an

affirmative showing . . . to the satisfaction of the department that the requirements of this section have been met, the business shall be allowed a credit against the tax remitted in this chapter." Paragraph (2)(b) states that the credit shall be allowed for up to 24 consecutive months, "beginning with the first tax return due pursuant to section 212.11 after approval by the department." When read together, these provisions make it clear that the Department's approval process is to occur during the ten-day window after receiving the certified application.

53. To interpret the requirements of section 212.096 as the Department does, serves to make both the ten-day window for approval in paragraphs (4) and (5), and the assurance to the taxpayer in paragraphs (2)(a) and (b) a nullity. As stated by the Supreme Court of Florida in Forsythe v. Longboat Key Beach Erosion Control District, 604 So. 2d 452, 455-456 (Fla. 1992):

> It is axiomatic that all parts of a statute must be read together in order to achieve a consistent whole. Where possible, courts must give full effect to all statutory provisions and construe related statutory provisions in harmony with one another. . . . To rule that a district which crosses county lines is dependent because it satisfies the criteria in subsection 189.403(2) would make a nullity of the second sentence in subsection 189.403(3). It is a cardinal rule of statutory interpretation that courts should avoid readings that would render part of a statute meaningless. (citations omitted).

See also Garay v. Dep't of Mgmt. Servs., 46 So. 3d 1227, 1229 (Fla. 1st DCA 2010) (appellant's interpretation of forfeiture statute would render it a nullity).

54. There is no question that with respect to each of the applications submitted during the audit period, the Department approved the applications. Under the rationale expressed in Angler Resorts, Michael's provided everything it was supposed to provide during the application process, and the Department had the opportunity to verify that information before approving the applications. Indeed, the application form submitted is the only form identified by the Department for verifying EZ credits in rule 12A-1.097(5)(e), adopted pursuant to section 212.11. Section 212.096(2)(a) mandates that once the application has been approved, the business shall be permitted to take the credit.

55. That being said, the wages actually paid to the employees, upon which the credits are based, are clearly not available at the time of the application, and remain subject to verification during the audit process. See §§ 212.096(7) and (8) and 213.34. As applied to this case, the Department should not have reexamined the applications already approved in order to disallow the EZ credits based on its conclusion that employees did not live within the enterprise zone, were not employees of Michael's at the time of the application, or that there was not an increase in employment, as those issues should have been

addressed at the time the application was approved. Had the Department done so, Michael's would have had the opportunity to correct any mistakes and reapply. The Department was, however, within its authority to verify whether the credits taken were appropriate, given the wages paid and the continued employment of the employees for whom the credits are claimed.

Who Is the Employer?

56. Petitioner argues that the inquiry stops at the determination that the Department should not have reexamined the applications submitted. However, because the Department must verify that the EZ credit is tied to the wages for each claimed employee, it was not impermissible for the Department, in the course of its audit, to insure that the named employees remained employed by Michael's during audit period. In that context, who constituted the employer during the audit period remains an issue for the Department to consider.

57. The Department contends that many of the employees were rightfully disallowed because they were employees of GHG as opposed to Michael's. Mr. Ward based his conclusion on GHG's provision of payroll services during the first two years of the audit period, and payment of the reemployment tax for those employees. It is noted that the Department's records indicated that Michael's did not have an active reemployment tax account at the time the Department approved the applications.

58. Michael's contends that it was an eligible business under the definition in section 212.096 because paragraph (1)(a) includes in its definition "any sole proprietorship, firm, partnership . . . syndicate, or other group or combination . . . located in an enterprise zone." It also relies on its payment for the salaries of the employees, despite GHG performing the payroll function, its claim for these employees on its federal income taxes, and the employees' continued performance of the responsibilities for Michael's that they performed prior to January 1, 2012.

59. Michael's' reliance on the inclusion of syndicates and groups in the definition of eligible employees must fail. While the definition would allow Michael's and GHG to apply for EZ credits as a group, each of the applications was submitted in Michael's name alone. Just as the Department cannot reconsider the validity of the approval of the applications at the audit stage, Michael's cannot claim the benefit of a designation it did not use when applying for the EZ credits.

60. The determinative factor is whether the employees fit the definition contained in section 212.096(1)(d), which provides:

> A person shall be deemed to be employed if the person performs duties in connection with the operations of the business on a regular, full-time basis, provided the person is performing such duties for an average of at

> least 36 hours per week each month. The person must be performing such duties at a business located in the enterprise zone.

Notably, nothing in this provision ties employment to which entity provides payment for reemployment taxes or which entity is listed on the employee's paycheck. The focus is on the duties performed.

61. Omar Azze testified that the applications were completed by providing information received from new hires at the restaurant. He also testified that the restaurant has a general manager, assistant managers, a head chef, bussers, waiters, cooks, support staff, and bartenders, which are clearly functions of a restaurant. The people working at each restaurant did not change when GHG began performing payroll functions; Michael's had its own distinct payroll and payroll records, and its employees performed the same functions before January 1, 2012, as they did after that date. The employees' salaries also were claimed on Michael's' federal income tax returns. Based on a preponderance of the evidence, the employees for which credits were sought were employees of Michael's, providing duties located within the enterprise zone.

62. Whether or not the employees worked the requisite 36 hours per week would not be something contained in the EZ credit application, and would be subject to audit.

63. In summary, the Department met its initial burden of demonstrating that it made an assessment, and the factual and

legal basis upon which it relied in making the assessment. Petitioner contends that the Notice of Decision does not address the factual basis for disallowances for 2014, and, therefore, no factual and legal basis for disallowing any credits in that year was demonstrated. However, as noted in the Findings of Fact, many of the credits disallowed for 2014 were based on applications filed in the prior two years, and with respect to the applications filed in January and March 2014, were based on employment beginning in 2013. In addition, the issue challenged by Michael's and addressed by the Department in its Notice of Decision dealt with the Department's ability to revisit the basis of the applications, which was an issue that affected the audit process for all three years.

64. While the Department must demonstrate the factual and legal basis for making its assessment, section 120.80(14)(b)2. does not require that the Department prove that ultimately, its factual and legal basis was correct. Michael's met its burden of demonstrating that the legal basis the Department used for disallowing the majority of EZ credits was flawed.

65. Petitioner acknowledges in footnote 10 of its Proposed Recommended Order that the auditor disallowed credits based on a discrepancy in the wages paid, and he assessed $3,657.00 based on that disallowance. The Department's actions in auditing the amount of wages paid compared to the credits claimed were

authorized and proper. Clearly, however, the scope of disallowed credits based on wage discrepancies is substantially restricted compared to disallowances reflected in the Notice of Decision.

Penalty Considerations

66. With respect to that portion of the assessment that remains, whether an assessment of penalties is appropriate under the Department's rule must be determined. Obviously the amount of assessment subject to penalties would be significantly reduced should the Department accept the Conclusions of Law contained in this Recommended Order. In the event that the Department chooses to reject these Conclusions of Law, an analysis of the appropriate penalty based upon rule 12-13.007, for both the original assessment and the conclusions rejecting much of the assessment, is provided.

67. Rule 12-13.007(1) provides that the Executive Director or designee shall:

> [M]ake a determination whether the taxpayer's noncompliance was due to reasonable cause and not to willful negligence, willful neglect, or fraud based on the facts and circumstances of the specific case. The standard used in this determination is whether the taxpayer exercised ordinary care and prudence and was nevertheless unable to comply.

68. The rule lists a number of factors to consider when determining reasonable cause and provides, in pertinent part:

> (1)(a) When evaluating the facts and circumstances relevant to penalties assessed

> as a result of an audit, the Department shall consider information provided by the taxpayer in relation to the following:
> 1. Whether the taxpayer has been audited previously, and, if so, whether the penalties which are the subject of the compromise request result from taxpayer actions that resulted in a specific issue-related deficiency assessment during one or more of the previous audits. It is not the intent of this subparagraph to apply to infrequent occurrences of human error;
> 2. The materiality of the tax deficiency assessed in an audit when considered within the context of taxes correctly reported and timely remitted by the taxpayer for the same tax during the same audit period;
> 3. Whether the taxpayer has initiated controls or other actions that will promote proper future reporting with respect to those activities which contributed to the audit deficiency and related penalties; and
> 4. Whether the tax was collected and not remitted to the state by the taxpayer.

69. Here, Michael's has been audited previously, and at least some of the disallowance in the previous audit involved EZ credits. The reasons for the disallowance in the previous audit are not clear from this record, and the majority of the prior assessment attributed to EZ credits was compromised.

70. The rule also provides a series of examples of what might be considered reasonable cause. They include the following:

> (3) Ignorance of the law or an erroneous belief as to the need to comply with a revenue law constitutes reasonable cause when there are facts and circumstances which indicate ordinary care and prudence was exercised by the taxpayer.
> (a) For example, ignorance of the law or an erroneous belief held by the taxpayer is a

basis for reasonable cause when the taxpayer has a limited knowledge of business, a limited education, limited experience in Florida tax matters, or advice received from a competent advisor was relied upon in complying with the provisions of a revenue law.

(b) A good faith belief held by a taxpayer with limited business knowledge, limited education, or limited experience with Florida tax matters is a basis for reasonable cause when there is reasonable doubt as to whether compliance is required in view of conflicting rulings, decisions, or ambiguities in the law.

(4) Reliance upon the erroneous advice of an advisor is a basis for reasonable cause when the taxpayer relied in good faith upon written advice of an advisor who was competent in Florida tax matters and the advisor acted with full knowledge of all of the essential facts. Informal advice, advice based upon insufficient facts, advice received in cases where facts were deliberately concealed, or obviously erroneous advice are not grounds for reasonable cause. To establish reasonable cause based upon reliance on the advice of a competent advisor, the taxpayer shall demonstrate:

(a) That the taxpayer sought timely advice of a person who was competent in Florida tax matters;

(b) That the taxpayer provided the advisor with all of the necessary information and withheld nothing; and

(c) That the taxpayer acted in good faith upon written advice actually received from the advisor.

* * *

(6) Reliance upon another person to comply with filing requirements, or to obtain information, or to properly prepare returns or reports, is a basis for reasonable cause, depending upon the circumstances.

> Noncompliance due to nonperformance of a ministerial-type function, inadvertent misplacement of returns, reports, or information, or the failure of the taxpayer's agent to properly prepare or file returns or reports are each a basis for reasonable cause when the taxpayer establishes that adequate procedures or steps for complying existed; that the person responsible for performing the function ordinarily performed the task properly; or, that extenuating or unusual circumstances prevented compliance.

71. In this case, the comptroller in charge of Petitioner's finances began his employment shortly before the audit period. He is not the same employee involved in the prior audit. Moreover, he testified that before setting up the arrangement with GHG to provide services to Michael's, management had consulted an accounting consultant who had assured them that the arrangement was permissible, and that they would be authorized to take the EZ credits. Based on Mr. Azze's testimony, Michael's was relying on an advisor they perceived to be competent. Moreover, there existed conflicting decisions regarding the process related to enterprise zone credits, i.e., Angler Resorts and Epic Hotel, and Michael's relied on those decisions. The amount attributable to EZ credits in the prior audit was compromised for settlement purposes, leading to the reasonable belief by Petitioner that its position with respect to EZ credits was defensible. These factors would create reasonable cause under the criteria in rule 12-13.007(3).

72. Petitioner also relied on another company hired to assist in filing requirements for the applications for EZ credits. Mr. Azze described what information was supplied to EDC in order to prepare the reports, and the information supplied seems reasonable. Moreover, the method by which Mr. Ward verified addresses for employees was not a tool available to Petitioner, and Mr. Ward admitted that the DAVID files are not definitive in terms of address verification.

73. Finally, if the assessment is limited to the amount attributable to wage verification, then the amount assessed is not material when considered within the context of the taxes correctly reported and timely remitted for the tax period subject to the audit.

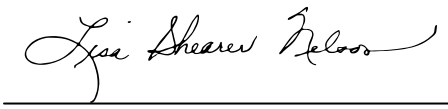
74. After considering these factors, it is recommended that no penalty be assessed, regardless of whether the assessment is consistent with the recommendation in this Order or whether the Department chooses to reject these conclusions of law in favor of a different interpretation.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Revenue enter a final order assessing additional taxes based upon discrepancies in wages paid for eligible employees, and rejecting those parts of the assessment attributable to disallowance of enterprise zone

credits based on information related to Petitioner's initial applications. It is further recommended that no penalties be imposed on the reduced assessment.

DONE AND ENTERED this 16th day of June, 2017, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of June, 2017.

ENDNOTES

[1/] Mr. Azze became the comptroller for GHG in July 2011. He was not the comptroller for the period covered by the prior audit.

[2/] As Mr. Ward admitted, DAVID is not a definitive basis for verifying a person's residence. Given the nature of employees typically working at a restaurant, the question arises whether any of these workers could be students living in the enterprise zone while attending school, but maintaining their permanent residence elsewhere. No evidence was presented on this issue other than that Michael's relied upon the information provided by its employees when they applied for employment.

[3/] The administrative law judge found that the employees identified in Epic Hotel's application were employees of Kimpton Hotel and Restaurant Group, Inc., who provide contracted services at Epic Hotel, but were not direct employees or employees leased by Epic Hotel.

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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.