

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF REVENUE,

Petitioner,

vs.

Case No. 17-3452

VMOB, LLC, d/b/a CHEAP ON  
HOWARD,

Respondent.

\_\_\_\_\_/   
VMOB, LLC, d/b/a CHEAP ON  
HOWARD,

Petitioner,

vs.

Case No. 17-3630

DEPARTMENT OF REVENUE,

Respondent.

\_\_\_\_\_/

RECOMMENDED ORDER

Pursuant to notice, a final hearing in this cause was held by video teleconference between sites in Tampa and Tallahassee, Florida, on January 17, 2018, before Linzie F. Bogan, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner Department of Revenue:

Mark S. Urban, Esquire  
Florida Office of the Attorney General  
The Capitol, Plaza Level 01  
Tallahassee, Florida 32399

For Respondent VMOB, LLC, d/b/a Cheap on Howard:

William B. Meacham, Esquire  
308 East Plymouth Street  
Tampa, Florida 33603

STATEMENT OF THE ISSUES

The issues are as follows: 1) Whether grounds exist to revoke the Certificate of Registration to collect taxes held by VMOB, LLC, d/b/a Cheap on Howard; 2) Whether factual and legal grounds support the Department of Revenue's jeopardy findings and assessments for October 2016, November 2016, December 2016, and February 2017; and 3) Whether factual and legal grounds support the Department of Revenue's assessment of personal liability against VMOB's managing member, Verna Bartlett.

PRELIMINARY STATEMENT

The Department of Revenue (Department) seeks to revoke the Certificate of Registration issued to VMOB, LLC, d/b/a Cheap on Howard (VMOB). The Department entered into a Compliance Agreement with VMOB on August 18, 2017. VMOB allegedly violated the terms of the Compliance Agreement by: not timely making Compliance Agreement payments; not timely remitting current tax

obligations; and not contacting the Department 10 days prior to the final Compliance Agreement payment due date to renegotiate the final installment.

The Department, for the months October through December 2016, and February 2017, also issued Notices of Jeopardy Findings and Notices of Final Assessments because the Department believed that collection of the tax, penalty, fees, or interest for those months was in jeopardy.

The Department also issued Ms. Bartlett, managing member of VMOB, a Notice of Assessment of Personal Liability pursuant to section 213.29, Florida Statutes, due to Ms. Bartlett's alleged willful attempts to evade or defeat tax, or payment of tax owed.

VMOB requested a formal hearing to contest these actions by the Department in Division of Administrative Hearings (DOAH) Case Nos. 17-3452 and 17-3630. The cases were consolidated and a formal hearing was held. At the formal hearing, the Department called two witnesses, Kimberly Ridgeway and Rolinda Smoak. Department Exhibits 1 through 37 and 40 through 43 were admitted into evidence. VMOB called one witness, Verna Bartlett. VMOB's Exhibits 1 through 13 were admitted into evidence.

At the conclusion of the hearing, the parties advised that a transcript of the final hearing would be ordered, and that proposed recommended orders would be due 20 days after the

filing of the transcript. The Transcript of the final hearing was filed on February 14, 2018. After the granting of three additional days for the filing of proposed recommended orders, each party, on March 9, 2018, filed its Proposed Recommended Order, and the same were considered in preparation of this Recommended Order.

STATEMENT OF FACTS

**I. 17-3452 Revocation Action**

1. The Department is charged with the responsibility of implementing and administering the revenue laws of the State of Florida, including the laws relating to the imposition and collection of the state's sales and use tax, pursuant to chapter 212, Florida Statutes.<sup>1/</sup>

2. VMOB is a Florida limited liability company with its principal address at 317 South Howard Avenue, Tampa, Florida 33606.

3. VMOB is registered with the Department as a dealer pursuant to section 212.18, and was issued Sales and Use Tax Certificate of Registration number 39-8016555696-3 (Certificate of Registration).

4. Ms. Bartlett is, and has been since its inception, VMOB's managing member responsible for collecting and remitting VMOB's sales and use tax.

5. Lewis Mustard, Jr., is Ms. Bartlett's husband. Mr. Mustard became VMOB's Power of Attorney (POA) in October of 2016.
6. The Department issued and filed against VMOB delinquent tax warrants, notices of liens, and judgment lien certificates for the collection of delinquent sales and use tax.
7. On or about July 28, 2015, the Department commenced the process of revoking VMOB's Certificate of Registration by sending VMOB a Notice of Conference on Revocation of Certificate of Registration (Notice of Conference).
8. The Notice of Conference informed VMOB that: an informal conference to discuss the grounds for revocation would be held on September 3, 2015; the Department intended to revoke VMOB's Certificate of Registration based upon VMOB's alleged violation of Florida tax law; and VMOB would have a final opportunity at the conference to present evidence regarding the Department's intended revocation or enter into a compliance agreement.
9. Ms. Bartlett appeared on behalf of VMOB at the revocation conference, and entered into a compliance agreement with the Department on August 18, 2015.
10. The Compliance Agreement identifies Respondent as the "Taxpayer" and provides, in part, as follows:

3. The Taxpayer has violated the tax laws of the State of Florida by failing to timely file returns/reports and pay all taxes due from the Taxpayer, resulting in the filing of a warrant, notice of lien, and/or judgment lien certificate.

4. As a result of these violations, the Taxpayer admits a past due (Sales and Use tax) liability to the State of Florida of \$52,088.90 which is comprised of \$43,595.83 tax, \$2,469.18 interest, \$3,463.20 penalty and \$2,560.69 fees.

5. As a result of these violations, the Taxpayer admits a past due (Re-employment tax) liability to the State of Florida of \$5,408.45, which is comprised of \$5,198.75 tax, \$50.48 interest, \$0.00 penalty and \$159.22 fees.

11. The Compliance Agreement also provides that "IN CONSIDERATION for the Department refraining from pursuing revocation proceedings at this time, the Taxpayer agrees" to the following:

7. Taxpayer agrees to timely remit all payments to the Department as stated in the attached payment schedule.

8. To accurately complete and timely file all required tax returns and reports for the next 12 months, beginning with the first return/report due following the date of this agreement.

9. To timely remit payment in full for all types of taxes, returns, and reports due from the Taxpayer for the duration of this agreement (including any extensions hereof) or for the next 12 months following the date of this agreement, whichever is longer.

10. To comply with all provisions of Chapter(s) 212, 213, [and] 443, Florida Statutes.

12. Numbered paragraph 13 of the Compliance Agreement provides that "there shall be no modification of the terms of th[e] agreement other than in writing and signed by both parties." The record herein contains no credible evidence that the Compliance Agreement was modified.

13. Numbered paragraph 15 of the Compliance Agreement provides that "[i]f the Taxpayer fails to comply with any obligation under this agreement, the Department has the right to pursue revocation of the Taxpayer's certificate of registration/permit/license without further notice by filing an Administrative Complaint pursuant to Section 120.60, Florida Statutes."

14. Numbered paragraph 17 of the Compliance Agreement provides that "[t]he waiver by the Department of any breach of this agreement by the Taxpayer shall not constitute a waiver of any other breach."

15. Numbered paragraph 20 of the Compliance Agreement provides that the "[p]ayment agreement schedule may be re-negotiated for the balloon payment due. Taxpayer must contact the Service Center 10 days prior to the due date of the last payment."

16. The Compliance Agreement payment schedule established 12 monthly payments, with the first payment of \$16,760 due on August 17, 2015, and the final balloon payment of \$15,737.35 due on July 25, 2016. The remaining payments under the agreement were in amounts of \$2,500, with each of the installments in question due on the 25th day of the month. The payment schedule also provides that "[a]ll payment must be made in certified funds, money order, EFT, debit card, or credit card and received at the Tampa Service Center by the close of business on the due date."

17. The Administrative Complaint alleges that:

Respondent violated the terms of the Compliance Agreement by not timely making the compliance agreement payments due on January 25, 2016, and April 25, 2016; by not timely remitting sales and use tax collected from customers during June 2016 (returned for non-sufficient funds), July 2016 (returned for non-sufficient funds), August 2016 (returned for non-sufficient funds), September 2016 (returned for non-sufficient funds), and October 2016 (returned for non-sufficient funds); and by not contacting the Department 10 days prior to the final payment due July 25, 2016, to renegotiate the balloon payment.

A. Failure to Timely Make Compliance Agreement Payments

18. As it specifically relates to the allegations herein, VMOB, pursuant to the terms of the Compliance Agreement, agreed to make payments of \$2,500 on January 25, 2016, and



April 25, 2016. The January payment was received and accepted by the Department on January 27, 2016. VMOB's January 2016 Compliance Agreement payment was made beyond the date due, and was appropriately deemed "late" by the Department. VMOB's April payment was received by the Department on April 26, 2016, and the evidence does not indicate that the Department treated this payment as having been received "late."<sup>2/</sup> By remitting its January 2016 payment after the due date, VMOB failed to comply with the terms of the Compliance Agreement.

19. VMOB contends that the Department, by accepting the January 2016 payment after the due date, waived "any breach" by VMOB and is therefore estopped from pursuing revocation of VMOB's Certificate of Registration. As previously noted, numbered paragraph 17 of the Compliance Agreement provides that "[t]he waiver by the Department of any breach of this agreement by the Taxpayer shall not constitute a waiver of any other breach."

20. By accepting payment after the due date, it may be the case that the Department waived its right to pursue a revocation action based on VMOB's "non-payment" of its obligation. However, as contemplated by paragraph 17 of the Compliance Agreement, the waiver of a claim based on non-payment does not preclude the Department from revoking VMOB's Certificate of Registration based on the company's "late payment" of its

obligation. In other words, the fact that payment was accepted by the Department after the due date does not negate the fact that payment was late. Therefore, the Department's claim based on untimely payment survives the possible waiver by the Department of any claim based on VMOB's non-payment.

21. The Department's acceptance of VMOB's late payment did not result in a waiver of the Department's right to seek revocation of VMOB's Certificate of Registration resulting from VMOB's failure to timely remit payment as required by the Compliance Agreement.

B. Not Timely Remitting Sales and Use Tax Payments

22. The Administrative Complaint alleges that VMOB violated the terms of the Compliance Agreement by failing to timely remit sales and use tax collected from customers during June and July 2015, and June through October 2016.<sup>3/</sup>

23. As previously noted, the Compliance Agreement was executed on August 18, 2015, and there is no credible evidence that the Compliance Agreement was extended by the parties. Therefore, VMOB's obligations under the Compliance Agreement commenced on August 18, 2015, and ended on August 17, 2016.

24. It is undisputed that sales and use tax payments for any particular month are late if not paid by the 20th day of the following month.

25. Regarding the June 2015 sales and use tax payment, VMOB could not have breached the Compliance Agreement as alleged because this payment was due on or before July 20, 2015, which is prior to the effective date of the agreement.

26. The sales and use tax payment for July 2015 was due on or before August 20, 2015, which due date fell within the period covered by the Compliance Agreement. Department Exhibit 25, page 10, contains a handwritten note indicating that VMOB filed a return for July 2015 but failed to remit payment. The record is unclear as to whether VMOB ever satisfied this obligation, and the Department, in its Proposed Recommended Order, makes no mention of the absence of this payment as a basis for revoking VMOB's Certificate of Registration due to the late payment of the same.

27. Regarding the July 2016 sales and use tax payment, VMOB could not have breached the Compliance Agreement as alleged because this payment was due no later than August 20, 2016, which was after the expiration of the Compliance Agreement. The same is also true for the August 2016, September 2016, and October 2016 sales and use tax payments.

28. As for the June 2016 sales and use tax payment, the evidence is undisputed that \$7,011.58 was due on or before July 20, 2016, and that VMOB did not pay the same until on or

about October 25, 2016. VMOB failed to remit this payment in accordance with the terms of the Compliance Agreement.

29. Paragraphs 13 and 14 of the Administrative Complaint allege that VMOB failed to remit payment of the interest, penalties, and fees resulting from the late payment of the sales and use taxes that were due in June 2016. Neither the Administrative Complaint nor the Department's Proposed Recommended Order itemizes the interest, penalties, and fees resulting from the late payment and, therefore, the exact amount due cannot be determined based on the instant record.

30. VMOB contends that the Department waived any breach by VMOB because the Department accepted the late payment without a reservation of rights and by accepting the monthly Compliance Agreement payments from June 2016 through February 2017. By accepting payment after the due date, it may be the case that the Department waived its right to pursue a revocation action based on VMOB's "non-payment" of its obligation. However, as contemplated by paragraph 17 of the Compliance Agreement, the waiver of a claim based on non-payment does not preclude the Department from revoking VMOB's Certificate of Registration based on the company's "late payment" of its obligation. In other words, the fact that payment was accepted by the Department after the due date does not negate the fact that payment was late. Therefore, the Department's claim based on

untimely payment survives the possible waiver by the Department of any claim based on VMOB's non-payment.

31. The Department's acceptance of VMOB's late payment of sales and use tax did not result in a waiver of the Department's right to seek revocation of VMOB's Certificate of Registration due to VMOB's failure to timely remit sales and use tax as required by the Compliance Agreement.

C. Reemployment Tax

32. Paragraph 19 of the Administrative Complaint alleges that "Respondent failed to timely remit payment for the Re-employment tax due and owing . . . for the calendar quarters ending March 2016, June 2016, and September 2016."<sup>4/</sup>

33. In paragraph 18 of its Proposed Recommended Order, the Department, as to the only finding of fact proposed for this issue, indicates that "Notice of Tax Liens were issued for the failure to remit reemployment taxes . . . [and] [t]hese reporting periods fall within the Compliance Agreement's 12-month period of required compliance." The mere issuance of notices of tax liens, without supporting documentation, is insufficient to prove that VMOB failed to timely remit the reemployment payments as alleged.

D. Renegotiation of Balloon Payment

34. Paragraph 28 of the Administrative Complaint alleges, in part, that VMOB violated the terms of the Compliance

Agreement "by not contacting the Department 10 days prior to the final payment due July 25, 2016, to renegotiate the balloon payment."

35. As previously noted, paragraph 20 of the Compliance Agreement provides that the "[p]ayment agreement schedule may be re-negotiated for the balloon payment due. Taxpayer must contact the Service Center 10 days prior to the due date of the last payment." Contrary to the allegation, paragraph 20 only required VMOB to contact the Department within 10 days of the due date of the final payment if VMOB desired to renegotiate the balloon payment. There is no evidence that VMOB intended to renegotiate the final installment, and the absence of such an intent means that VMOB was under no obligation to contact the Department within the stated 10-day period.

E. Electronic Filing and Payment

36. In paragraph 16 of its Proposed Recommended Order, the Department contends that "VMOB was required to file and pay sales and use taxes and reemployment taxes electronically beginning January 2, 2016, [and that] VMOB, in violation of the Compliance Agreement, has never filed or paid their sales and use taxes or reemployment taxes electronically." As appropriately noted by VMOB, "the Department did not allege in the Administrative Complaint that VMOB breached the Compliance Agreement by . . . failing to file electronically."

37. Because the Administrative Complaint did not give notice to VMOB that its alleged failure to file electronically was being used as grounds for revocation of its Certificate of Registration, VMOB's argument is well taken that this issue is not properly before DOAH.<sup>5/</sup>

## **II. 17-3630 Notices of Jeopardy Findings**

38. A Notice of Jeopardy Finding and a Notice of Final Assessment, dated October 3, 2016, were mailed to VMOB's mailing address via certified mail and regular U.S. mail. The certified mailing was returned to the Department as unclaimed, and the regular U.S mailing was not returned. The Notice of Jeopardy Finding advised that sales and use taxes for July 2016 and August 2016 appeared to be in jeopardy because of the worthless checks issued by VMOB for payment of these taxes. The notice also advised VMOB of the opportunity to appear at a conference or otherwise challenge the assessment. VMOB did not formally or informally protest the October jeopardy finding and assessment, and therefore waived its right to do so in the instant proceeding. On or about June 2, 2017, VMOB paid the amount due for sales and use taxes, as referenced in the notices of October 3, 2016, but did not pay the amounts due for penalty, interest, and fees.

39. A Notice of Jeopardy Finding and a Notice of Final Assessment, dated November 8, 2016, were mailed to VMOB's

principal address via certified mail and regular U.S. mail. The certified mail was returned to the Department as unclaimed, and the regular U.S. mailing was not returned. The Notice of Jeopardy Finding advised that sales and use taxes for September 2016 appeared to be in jeopardy because of the worthless check issued by VMOB for payment of these taxes. The notice also advised VMOB of the opportunity to appear at a conference or otherwise challenge the assessment. VMOB did not formally or informally protest the November jeopardy finding and assessment, and therefore waived its right to do so in the instant proceeding. On or about June 2, 2017, VMOB paid the amount due for sales and use taxes, as referenced in the notices of November 8, 2016, but did not pay the amounts due for penalty, interest, and fees.

40. A Notice of Jeopardy Finding and a Notice of Final Assessment, dated December 12, 2016, were mailed to VMOB's mailing address via certified mail and regular U.S. mail. The certified mail was returned to the Department as unclaimed, and the regular U.S. mailing was not returned. Ms. Bartlett acknowledged receiving the respective notices. The Notice of Jeopardy Finding advised that sales and use taxes for October 2016 appeared to be in jeopardy because of the worthless check issued by VMOB for payment of these taxes. The notice also advised VMOB of the opportunity to appear at a conference or



otherwise challenge the assessment. VMOB did not timely informally challenge the December jeopardy finding and assessment, however, VMOB did file a timely formal challenge to the jeopardy finding and assessment. On or about June 2, 2017, VMOB paid the amount due for sales and use taxes but did not pay the amounts due for penalty, interest, and fees. The sales and use tax collected by VMOB for October 2016 are not currently in jeopardy.

41. A Notice of Jeopardy Finding and a Notice of Final Assessment, dated February 3, 2017, were mailed to VMOB's mailing address via certified mail and regular U.S. mail. The certified mail was returned to the Department as unclaimed. The Notice of Jeopardy Finding advised that sales and use taxes for November 2016 and December 2016 appeared to be in jeopardy because of the worthless checks issued by VMOB for payment of these taxes. VMOB did not timely informally challenge the February jeopardy finding and assessment, however, VMOB did timely file a formal challenge to the jeopardy finding and assessment. VMOB Exhibit 4 includes copies of checks remitted to the Department. None of the checks purport to be payment of the jeopardy amounts for either November or December 2016. The sales and use tax collected by VMOB for November and December 2016 are in jeopardy.<sup>6/</sup>

### **III. Personal Liability**

42. After VMOB breached the Compliance Agreement, the Department, on January 9, 2017, issued a Notice of Assessment of Personal Liability (NOPL) against Ms. Bartlett. The NOPL was mailed to VMOB's principal address via certified mail and regular U.S. mail. The certified mail was returned unclaimed, but Ms. Bartlett acknowledged receiving the NOPL.

Ms. Bartlett/VMOB requested a formal hearing to contest the NOPL. The NOPL relates to the time period of July 1, 2015, through October 31, 2016.

43. Ms. Bartlett had administrative control over VMOB and was personally responsible for collecting VMOB's sales tax, and remitting it to the Department during this time period.

44. The evidence clearly and convincingly establishes that Ms. Bartlett did not submit a payment on behalf of VMOB with the sales and use tax return for the period of July 2015; and that Ms. Bartlett issued worthless checks on behalf of VMOB for sales and use tax due for the periods of June 2016 through October 2016. Tax warrants were issued and judgment liens were recorded for these reporting periods.

45. The outstanding tax owed by VMOB through October 31, 2016, was \$40,530.02. Pursuant to section 213.29, the Department assessed against Ms. Bartlett a penalty of double the tax owed by

VMOB, thus totaling \$81,060.04. In addition to the \$40,530.02 outstanding tax due by VMOB for the period July 1, 2015, through October 31, 2016, there were also penalties, interest, and fees for this period totaling \$5,649.54. Additional interest and fees in the amount of \$3,773.73, as calculated in accordance with sections 213.235 and 213.24 and Tax Information Publication No. 17ADM-02, have accrued through March 7, 2018, resulting in an obligation of \$9,423.27, in penalty, interest, and fees.

46. A tax liability of \$40,530.02, plus \$9,423.27 in penalty, interest, and fees, totals \$49,953.29, which is the amount owed for the period July 1, 2015, through October 31, 2016.

47. After the NOPL was issued, the following payments were made towards the liability for this period: \$7,357.44 on January 26, 2017; \$1,557.13 on February 27, 2017; and the following four payments on June 2, 2017: \$9,437.47, \$8,716.50, \$7,067.28, and \$6,619.90 for a total of \$40,755.72.

48. Ms. Bartlett contends that through these payments, she satisfied the taxes owed on the periods associated with the NOPL and should accordingly have the NOPL eliminated. Because warrants and liens have been filed and recorded against VMOB, the Department applied the payments towards VMOB's liabilities in the following order, pursuant to section 213.75(2): (a) first, against the costs to record the warrant or lien, if any;

(b) second, against the administrative collection processing fee, if any; (c) third, against any accrued interest; (d) fourth, against any accrued penalty; and finally, (e) against any tax due. Given this hierarchy of payment prioritization, taxes (as well as penalty, interest, and fees) for this period remain outstanding. The total outstanding liability through March 7, 2018 (for the period July 1, 2015, through October 31, 2016), is \$9,197.57 (\$49,953.29 - \$40,755.75), of which \$8,750.96 is tax.

49. Ms. Bartlett contends that it was not until the end of May 2017 that she became aware that VMOB issued worthless checks for the period in question. Ms. Bartlett's assertion is not supported by the credible and competent evidence.

50. The credible evidence establishes that for each returned check, the Department's system automatically mailed out a bill, and the regular mail sent to VMOB containing these bills was never returned as undeliverable.

51. The credible evidence establishes that on November 28, 2016, Ms. Smoak explained to Mr. Mustard, in his capacity as POA for VMOB, that VMOB could not continue to write worthless checks to the Department.

52. The credible evidence shows that on December 6, 2016, a fax was sent by the Department to Mr. Mustard, which set forth VMOB's liabilities owed to the Department.

53. The credible evidence establishes that on December 28, 2016, Ms. Smoak asked Mr. Mustard to again inform Ms. Bartlett that she could not continue to submit worthless checks to the Department.

54. The credible evidence establishes that in January of 2017, Ms. Bartlett received and responded to the NOPL.

55. The credible evidence establishes that on or about January 3, 2017, Ms. Bartlett sent correspondence to the Department regarding the December 2016 Notice of Jeopardy Finding.

56. The credible evidence establishes that on or about February 27, 2017, Ms. Bartlett sent correspondence to the Department regarding the February 3, 2017, Notice of Jeopardy Finding.

57. Despite being its managing member, Ms. Bartlett admits that from June 2016 through October 2016, she had limited involvement with VMOB, did not monitor its checking accounts or finances, and pre-signed the worthless checks that were tendered to the Department as payment for VMOB's obligations.

#### CONCLUSIONS OF LAW

58. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to section 120.569, Florida Statutes.

59. The Department is an agency of the State of Florida lawfully created and organized pursuant to section 20.21, Florida Statutes.

60. Pursuant to chapter 212, the Department is vested with the responsibility of implementing and administering the revenue laws of the State of Florida, including the laws relating to the imposition and collection of the State's sales and use tax.

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

As stated by the Florida Supreme Court:

Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Henson, 913 So. 2d 579, 590 (Fla. 2005) (quoting Slomowitz v. Walker, 492 So. 2d 797, 800 (Fla. 4th DCA 1983)); accord Westinghouse Electric Corp. v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991) ("Although this standard of proof

may be met where the evidence is in conflict . . . it seems to preclude evidence that is ambiguous.”).

62. Every person desiring to engage in or conduct business in this State as a dealer, as defined in chapter 212, must be licensed by the Department, pursuant to section 212.18. VMOB is a dealer within the meaning of chapter 212.

63. Pursuant to section 212.05(1), certificates of registration issued by the Department grant dealers the privilege of engaging in or conducting business in this state.

64. In accordance with section 212.15(1) and (2), the taxes imposed pursuant to chapter 212, become state funds at the moment of collection, and the intentional failure to remit these taxes constitutes theft of state funds.

65. Section 212.15(1) requires that dealers collect and remit to the Department the tax imposed by chapter 212 on a monthly basis. The collected taxes are due on the first day of the succeeding calendar month and are considered late if not paid to the Department by the 20th day of the month when due.

66. Sections 212.18 and 213.692 authorize the Department to revoke all certificates of registration, permits, or licenses issued by the Department to a dealer who fails to comply with a Compliance Agreement.

67. The Department proved by clear and convincing evidence that VMOB violated the terms of the Compliance Agreement by

failing to timely make the scheduled payment due on January 25, 2016, and by not timely remitting the sales and use tax payment due for June 2016.

68. "The department shall issue to the taxpayer, with any jeopardy assessment, a notice or finding of the facts which constitute a jeopardy to the revenue." § 213.732, Fla. Stat.

69. The Department proved by clear and convincing evidence that the sales and use taxes owed by VMOB, as reflected in the Notice of Jeopardy Finding dated December 12, 2016, were in jeopardy at the time of issuance of the notice and, accordingly, the Department's jeopardy findings and assessments for this period are sustained.

70. The Department proved by clear and convincing evidence that the sales and use taxes owed by VMOB for November and December 2016 are in jeopardy and the Department's jeopardy findings and assessments for these months are sustained.

71. Anyone required to collect sales and use tax who willfully attempts in any manner to evade or defeat such tax or the payment thereof, or any officer or director with administrative control over the collection and payment of tax and who willfully directs an employee of the corporation to evade or defeat such tax or the payment thereof, is liable to a penalty equal to twice the total amount of the tax evaded or not accounted for or paid over. § 213.29, Fla. Stat.



72. "An assessment of penalty made pursuant to this section shall be deemed prima facie correct in any judicial or quasi-judicial proceeding brought to collect this penalty." § 213.29, Fla. Stat.

73. The taxpayer must prove that the Department departed from the requirements of law or that the assessment was not supported by any reasonable hypothesis of legality. Cf. Straughn v. Tuck, 354 So. 2d 368, 371 (Fla. 1978) (involving property tax assessments under ch. 193, Florida Statutes); Harris v. Dep't of Revenue, 563 So. 2d 97, 99 (Fla. 1st DCA 1990) (citing Straughn, 354 So. 2d at 371, for assessments under ch. 212).

74. Section 212.14(3) provides that the filing of a return not accompanied by payment is prima facie evidence of conversion of the money due.

75. The Department is authorized to estimate any unpaid deficiencies in tax to be assessed against the sales tax dealer upon such information as may be available to it, and to issue a delinquent tax warrant for the collection of such tax, interest, or penalties estimated to be due and payable, and any such assessment is deemed prima facie correct. § 212.14, Fla. Stat.

76. Florida law dictates the following priority order of the application of payments, when a warrant has been filed and recorded by the Department: (a) costs to record the warrant, if any; (b) administrative collection processing fees, if any;

(c) accrued interest, if any; (d) accrued penalty, if any; and (e) tax due, if any. § 213.75(2), Fla. Stat.

77. Florida law does not permit the taxpayer to dictate the priority order of the application of the payments, when a warrant has been filed and recorded. § 213.75(2), Fla. Stat. Additionally, the Department applies payments to the oldest warrants first.

78. During the period of July 2015 through October 2016, Ms. Bartlett had administrative control over the collection and payment of sales and use tax for VMOB and willfully failed to remit the collected tax to the Department.

79. Although Ms. Bartlett disputes the assessment, the evidence clearly and convincingly establishes that she willfully evaded the tax owed by abandoning her duties as a managing member, intentionally ignoring communications from the Department, breaching the Compliance Agreement, and continually issuing worthless checks.

80. The Department has issued and filed delinquent tax warrants and liens in the public records for the collection of the delinquent tax liability, pursuant to section 212.15(4).

81. The personal liability assessment for the period July 1, 2015, through October 31, 2016, is valid and correct; and, pursuant to section 213.29, Ms. Bartlett is liable for \$81,060.04, which is double the \$40,530.02 in tax that was owed

by VMOB at the time of the assessment. Because tax remains due, the penalty assessment is sustained.

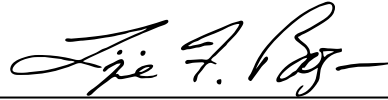
82. Once the remaining tax owed by VMOB of \$8,750.96 is paid, the \$81,060.04 personal liability assessment against Ms. Bartlett should be abated in accordance with section 213.29.

RECOMMENDATION

Based on the foregoing Findings of Facts and Conclusions of Law, it is RECOMMENDED that the Department of Revenue enter a final order:

1. That revokes Certificate of Registration 39-8016555696-3 issued by the Department to VMOB, LLC;
2. That sustains the Jeopardy Findings and Notices of Final Assessments dated December 12, 2016, and February 2, 2017; and,
3. That imposes a personal liability assessment against Verna Bartlett in the amount of \$81,060.04, subject to abatement.

DONE AND ENTERED this 10th day of April, 2018, in  
Tallahassee, Leon County, Florida.



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LINZIE F. BOGAN  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 10th day of April, 2018.

ENDNOTES

<sup>1/</sup> All subsequent references to Florida Statutes will be to 2017, unless otherwise indicated.

<sup>2/</sup> According to Department Exhibit 29, page 37, VMOB's Compliance Agreement payment for March 2016 was "late." The Administrative Complaint does not, however, charge this act of non-compliance as a basis for revocation.

<sup>3/</sup> Paragraphs 12 and 28 of the Administrative Complaint appear to involve the same alleged conduct. Paragraph 12, however, includes allegations for the months of June 2015 and July 2015.

<sup>4/</sup> The March 2016 reemployment tax period covered January 1, 2016, through March 31, 2016. The June 2016 reemployment tax period covered April 1, 2016, through June 30, 2016. The September 2016 reemployment tax period covered July 1, 2016, through September 30, 2016. According to Department Exhibit 13, page 2, of the \$4,807.46 total reemployment tax for this period, only two cents represents the amount due for the September 2016 period. Obviously a portion of the September 2016 period occurs beyond the end date of the Compliance Agreement.

<sup>5/</sup> See generally Conklin Center v. Williams, 519 So. 2d 38 (Fla. 5th DCA 1988) (procedural due process requires that parties to an administrative hearing be given notice of the matters to be addressed during the hearing). Additionally, section 120.60(5), Florida Statutes (2017), provides in part that "[n]o revocation . . . of any license is lawful unless . . . the agency has served . . . an administrative complaint which affords reasonable notice to the licensee of facts or conduct which warrants the intended action."

<sup>6/</sup> On or about October 7, 2016, Ms. Bartlett executed a POA designating Lewis Mustard, Jr., as representative for VMOB. Although Ms. Bartlett named Mr. Mustard as VMOB's representative, she also indicated in the power of attorney that all communications were to be sent to both her and her representative. While the evidence indicates that the Department did not provide copies of the jeopardy notices to Mr. Mustard, this is of no moment given that all jeopardy notices, and related documents, were provided to Ms. Bartlett.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.