STATE OF FLORIDA
DEPARTMENT OF REVENUE

DEPARTMENT OF REVENUE,

Petitioner,

vs.

DOAH Case No.: 17-3452

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

Respondent.

DOR 2020-003 - FOF

_____/

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

Petitioner,

vs.

DOAH Case No.: 17-3630

DEPARTMENT OF REVENUE,

Respondent.

_____/

AMENDED FINAL ORDER

This cause came before the State of Florida, Department of Revenue (Department), for the purpose of issuing an amended final order pursuant to the Opinion and Mandate issued by the Second District Court of Appeal in case number 2D18-2723. This matter involved several separate actions initiated by the Department, which were consolidated for hearing, and for purposes of this final order.

On January 30, 2017, the Department issued an Administrative Complaint (AC) against VMOB, LLC d/b/a Cheap on Howard (VMOB). In accordance with Sections 212.18 and 213.692, Florida Statutes, (F.S.), the AC sought to revoke the certificate of registration/permit/license issued to VMOB, due to VMOB's non-compliance with Chapter 212, F.S.

On October 3, 2016, November 8, 2016, December 12, 2016, and February 3, 2017, the Department issued Notices of Jeopardy Finding for October, November, December, and February, respectively, advising VMOB that the Department had determined that the factual and legal requirements for a finding of jeopardy and assessment thereunder had been met, in accordance with Section 213.732, F.S.

On January 9, 2017, the Department issued a Notice of Assessment Personal Liability to Verna Bartlett, sole managing member of VMOB pursuant to Section 213.29, F.S.

In response to the foregoing actions by the Department, both VMOB and Ms. Bartlett requested disputed fact hearings before the Division of Administrative Hearings (DOAH). On January 17, 2018 a disputed fact hearing was held before Linzie F. Bogan, Administrative Law Judge (ALJ) assigned by the DOAH. The issues addressed at the DOAH hearing were threefold: 1) Whether grounds exist to revoke the Certificate of Registration (COR) issued to VMOB pursuant to Section 212.18, F.S.; 2) Whether factual and legal grounds support the Department's jeopardy findings and assessments pursuant to Section 213.732, F.S., against VMOB for October 2016, November 2016, December 2016, and February 2017; and 3) Whether factual and legal grounds support the Department's assessment of personal liability against VMOB's managing member, Verna Bartlett, pursuant to Section 213.29, F.S.

The ALJ issued his recommended order (RO) on April 10, 2018. The RO is attached hereto and incorporated herein by reference as **Exhibit 1**. VMOB filed exceptions to the RO at the DOAH on April 25, 2018. VMOB's exceptions (without Exhibit A – a copy of the RO) are attached hereto and incorporated herein by reference as **Exhibit 2**. The Department filed a response to VMOB's exceptions with the Department of Revenue Agency Clerk on May 4, 2018. The Department's response to VMOB's exceptions is attached hereto and incorporated by reference as **Exhibit 3**.

Although the parties were advised by the RO to file exceptions "... with the agency that will issue the Final Order in this case" as required by law, VMOB's exceptions were not timely filed with the Department of Revenue Agency Clerk, as required by section 120.57(1)(k), F.S., and Rule 28-106.217, Florida Administrative

Code (F.A.C.). Although not required to rule upon exceptions that were not timely filed as required by law, or that do not meet the statutory pleading requirements set forth in Section 120.57(1)(k), F.S., the Department has decided to rule upon each exception as if appropriately pled and timely filed with the appropriate agency.

Citations to the record herein shall be noted as: "T. p. 1" for a transcript page number; DE 1: followed by the page or paragraph number for Department exhibits, as appropriate; and VE 1: followed by the page or paragraph number for VMOB's exhibits, as appropriate.

STANDARD OF REVIEW

Subsection 120.57(1)(k), F.S., sets forth the legal standard for ruling on exceptions in a Final Order issued as a result of a R.O.:

> The final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, **or** that does not include appropriate and specific citations to the record. (Emphasis added)

This statutory pleading requirement provides a three-prong threshold for exceptions to a recommended order that must be explicitly ruled upon in a Final Order: 1) Clear identification of the disputed portion of the RO by page number or paragraph; 2) Identification of the legal basis for the exception; and 3) Appropriate and specific citations to the record.

An agency may not reject or modify the ALJ's findings of fact unless the agency first determines from a review of the entire record, and so states with particularity, that the findings of fact were not based upon competent, substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. Subsection 120.57(1)(l), F.S. Competent substantial evidence is such evidence as establishes a substantial factual basis from which the facts at issue may be reasonably inferred, and which is sufficiently relevant and material that a

reasonable mind would rely upon it to support the conclusion reached. *Degroot v. Sheffield*, 95 So.2d 912 (Fla. 1957);

Primary responsibility for interpreting regulatory statutes and rules belongs with the agency which has the regulatory jurisdiction and expertise in regard to such statutes and rules. *Public Employees Relations Commission v. Dade County Police Benevolent Association*, 467 So.2d 987 (Fla. 1985); *Florida Public Employees Council, 79 v. Daniels*, 646 So.2d 813 (Fla. 1st DCA 1994). Agency interpretations of statutes and rules within its regulatory jurisdiction are accorded considerable deference, and should not be overturned unless they are "clearly erroneous." *Faulk v. Beard*, 614 So.2d 1086, 1089 (Fla. 1993); *Department of Environmental Regulation v. Goldring*, 477 So.2d 532, 534 (Fla. 1985). It is not necessary that an agency's interpretations of statutes and rules within its regulatory jurisdiction be the only reasonable interpretation, but they must be permissible. *Suddath Van Lines, Inc. v. Department of Environmental Protection*, 668 So.2d 209 (Fla. 1st DCA 1996).

RULINGS ON EXCEPTIONS

1) VMOB takes exception to the findings in RO paragraph 18 and the first paragraph under "Recommendation", arguing that there is no competent, substantial evidence in the record that VMOB failed to comply with the terms of a compliance agreement (CA) by remitting the CA payment due in January 2016 two days after its due date, and that the Department may revoke VMOB's COR as a consequence of such untimely payment. VMOB failed to identify the legal basis and record citations for this exception. There is competent, substantial evidence in the record to support the ALJ's findings of fact in paragraph 18 and the first paragraph under "Recommendation". (DE 8: paragraphs 7, 15, and payment schedule; DE 24; VE 1 pp. 1-3, paragraphs 7-10, 15-17; T. pp. 19, 38-39, 46-54, 59-61, 86-87, 94, 147-150, 189-190)

2) VMOB takes exception to the findings in RO paragraph 21, arguing that there is no competent, substantial evidence in the record that the Department's acceptance of a late payment for January 2016 did not result in a waiver of the Department's right to seek revocation for that late payment. VMOB's argument would

require the Department to reject untimely payments or risk a de facto waiver of the violation of a term of the CA. As the money due under the CA belonged to the state at the moment it was collected by VMOB, it is due whether there is a CA in effect or not. As the breach of untimeliness has occurred before the late payment is accepted by the Department, there can be no waiver of the breach of untimeliness by acceptance of the untimely payment. There is competent, substantial evidence in the record to support the ALJ's findings of fact in paragraph 21. (DE 8: paragraphs 7, 17, and payment schedule; DE 24; VE 1 pp. 1-3, paragraphs 7-10, 15-17; T. pp. 38-39, 46-54, 80, 94-97, 102, 135-136)

NOTE: VMOB argues the Department accepted CA payments through February 2017; however, the CA ended on August 17, 2016. Just as violations occurring *after* that date do not constitute violations of the CA, so payments made *after* that date do not constitute CA payments.

3) VMOB takes exception to the findings in RO paragraphs 30 and 31, arguing that there is no competent, substantial evidence in the record that VMOB breached the CA by failing to remit payment of sales tax collected in June 2016, and that the Department did not waive such breach by accepting the June 2016 sales tax payment in October 2016 and by accepting and retaining CA payments remitted from June 2016 through February 2017. VMOB's argument assumes that *timeliness* of CA payments and monthly collections is not a material requirement of the CA, contrary to paragraphs 7, 8, and the payment schedule of the CA. There is competent, substantial evidence in the record to support the ALJ's findings of fact in paragraphs 30 and 31. See NOTE above. (DE 8: paragraphs 7, 8, and payment schedule; DE 24; VE 1 pp. 1-3, paragraphs 7-10, 15-17; T. pp. 38-39, 46-54, 80, 94-97, 102, 135-136)

NOTE: VMOB repeatedly took issue with the extent to which it was notified of its breaches of the CA. In Paragraph 15 of the CA VMOB specifically agreed that the Department is not required to notify a Taxpayer of the Taxpayer's breach of the CA prior to proceeding with revocation. (DE 8; VE 1)

4) VMOB takes exception to the findings in RO paragraph 38 and endnote 6, arguing there is no competent, substantial evidence in the record that the Department

was not required to send its October 2016 jeopardy notice to the designated power of attorney (POA). This exception misstates the ALJ's findings. There was no finding that the Department was not required to serve its notice on the designated POA. The ALJ found that VMOB was properly served with the Department's notices and the failure of the Department to serve the POA did not relieve VMOB of its protest deadlines. Contrary to VMOB's allegation that there is no evidence in the record to support a finding that the Department was not required to send notices to VMOB and the POA, the POA form specifically provides in Section 6 that receipt of notices by either the POA or the taxpayer will be considered receipt by both. In addition, the October 3, 2016 jeopardy notice pre-dates the designation of the POA, which is dated October 7, 2016. VMOB failed to identify the legal basis and record citations for this exception. There is competent, substantial evidence in the record to support the ALJ's findings of fact in paragraph 38 and endnote 6. (DE 18: p. 33; VE 2: p. 2/sec. 6 of POA form; DE 18 p. 33)

5) VMOB takes exception to the findings in RO paragraph 39 and endnote 6, arguing there is no competent, substantial evidence in the record that the Department was not required to send its November 2016 jeopardy notice to the designated POA. This exception misstates the ALJ's findings. There was no finding that the Department was not required to serve its notice on the designated POA, the ALJ found that VMOB was properly served with the Department's notices, and the failure of the Department to serve the POA did not relieve VMOB of its protest deadlines. Contrary to VMOB's allegation that there is no evidence in the record to support a finding that the Department was not required to send notices to VMOB and the POA, the POA form specifically provides in Section 6 that receipt of notices by either the POA or the taxpayer will be considered receipt by both. VMOB failed to identify the legal basis and record citations for this exception. There is competent, substantial evidence in the record to support the ALJ's findings of fact in paragraph 39 and endnote 6. (DE 18: p. 33; VE 2: p. 2/sec. 6 of POA form; DE 18 p. 33)

6) VMOB takes exception to the findings in RO paragraph 40 and endnote 6, arguing there is no competent, substantial evidence in the record that the Department

was not required to send its December 2016 jeopardy notice to the designated POA. This exception misstates the ALJ's findings. There was no finding that the Department was not required to serve its notice on the designated POA, the ALJ found that VMOB was properly served with the Department's notices, and the failure of the Department to serve the POA did not relieve VMOB of its protest deadlines. Contrary to VMOB's allegation that there is no evidence in the record to support a finding that the Department was not required to send notices to VMOB and the POA, the POA form specifically provides in Section 6 that receipt of notices by either the POA or the taxpayer will be considered receipt by both. VMOB failed to identify the legal basis and record citations for this exception. There is competent, substantial evidence in the record to support the ALJ's findings of fact in paragraph 40 and endnote 6. (DE 18: p. 33; VE 2: p. 2/sec. 6 of POA form; DE 18 p. 33)

7) VMOB takes exception to the findings in RO paragraph 41 and endnote 6, arguing there is no competent, substantial evidence in the record that the Department was not required to send its February 2017 jeopardy notice to the designated POA. This exception misstates the ALJ's findings. There was no finding that the Department was not required to serve its notice on the designated POA, the ALJ found that VMOB was properly served with the Department's notices, and the failure of the Department to serve the POA did not relieve VMOB of its protest deadlines. Contrary to VMOB's allegation that there is no evidence in the record to support a finding that the Department was not required to send notices to VMOB and the POA, the POA form specifically provides in Section 6 that receipt of notices by either the POA or the taxpayer will be considered receipt by both. VMOB failed to identify the legal basis and record citations for this exception. There is competent, substantial evidence in the record to support the ALJ's findings of fact in paragraph 41 and endnote 6. (DE 18: p. 33; VE 2: p. 2/sec. 6 of POA form; DE 18 p. 33)

8) VMOB takes exception to the findings in RO paragraphs 41, 69, 70, and endnote 6, arguing there is no competent, substantial evidence in the record that the Department was not required to send notices to the designated POA, and that the Department did not prove by clear and convincing evidence any of the 5 conditions

required by Rule 12-21.005(1), F.A.C. In regard to the notices, this exception misstates the ALJ's findings. The ALJ did not find that the Department was not required to serve its notice on the designated POA, the ALJ found that VMOB was properly served with the Department's notices, and the failure of the Department to serve the POA did not relieve VMOB of its protest deadlines. Contrary to VMOB's allegation that there is no evidence in the record to support a finding that the Department was not required to send notices to VMOB and the POA, the POA form specifically provides in Section 6 that receipt of notices by either the POA or the taxpayer will be considered receipt by both. In regard to the evidence establishing jeopardy, the ALJ's findings regarding worthless checks issued for multiple periods, including the November 2016 and December 2016 sales tax collected from customers, as well as use tax, clearly establish the conditions set forth in Rule 12-21.005(1)(b), (c), (d), and (e), F.A.C. In addition, the record reflects: VMOB's very first sales and use tax payment was returned for non-payment; Verna Bartlett used the state's sales and use tax to keep her business operating; and VMOB accrued over $50,000.00 in sales tax, interest, and penalties in its first 9 months of operation. All of these findings support the specific grounds for jeopardy set forth in the Department's notices. VMOB failed to identify any record citations for this exception. VMOB failed to identify the legal basis and record citations for this exception. There is competent, substantial evidence in the record to support the ALJ's findings of fact in paragraphs 41, 69, 70, and endnote 6. In addition, to the extent that the findings in RO paragraphs 69 and 70 are deemed conclusions of law, the Department is unable to substitute a conclusion of law that is as or more reasonable than that determined by the ALJ. (DE 18: p. 33; VE 2: p. 2/sec. 6 of POA form; DE 16; DE 18 p. 33; T. pp. 28, 35-37, 64-66, 115, 186-187, 200, 203)

9) VMOB takes exception to the findings in RO paragraph 44, arguing there is no competent, substantial evidence in the record that Ms. Bartlett failed to submit payment with the July 2015 sales and use tax return for VMOB, and issued worthless checks for sales and use tax for June 2016 through October 2016. VMOB failed to identify the legal basis and record citations for this exception. VMOB failed to identify the legal basis and record citations for this exception. There is competent, substantial

evidence in the record to support the ALJ's findings of fact in paragraph 44. (VE 11; DE 13; DE 16 p. 6-9; DE 22 p. 1; DE 24: p. 10; DE 25: p. 11-20; DE 35; DE 41; T. pp. 64-65, 149-150, 152-154, 181-183, 195, 200, 203-204, 210).

10) VMOB takes exception to the findings in RO paragraph 45, arguing there is no competent, substantial evidence in the record that the outstanding tax owed by VMOB through October 31, 2016 was $40,530.02. VMOB failed to identify the legal basis and record citations for this exception. There is competent, substantial evidence in the record to support the ALJ's findings of fact in paragraph 45. (DE 18: p. 31; DE 29; T. pp. 129-132, 212-214)

11) VMOB takes exception to the findings in RO paragraphs 45 and 46, arguing that there is no competent, substantial evidence in the record that VMOB had a tax liability for additional penalties, interest, and fees for the period July 1, 2015 through October 31, 2016 of $9,423.27, and that VMOB's total tax liability for July 1, 2015 through October 31, 2016 was $49,953.29. VMOB misstates the ALJ's findings, in that the ALJ found that VMOB owed penalties, interest, and fees from July 1, 2015 through October 31, 2016 in the amount of $5,649.54, plus additional interest and fees through March 7, 2018 in the amount of $3,773.73, and that the total liability including tax, penalty, interest, and fees for that period was $49,953.29. VMOB failed to identify the legal basis and record citations for this exception. There is competent, substantial evidence in the record to support the ALJ's findings of fact in paragraphs 45 and 46. (DE 18: p. 31; T. pp. 129-132, 136-136, 193, 209-210, 212-214; ss. 213.235, 213.24, and 213.75, F.S.)

12) VMOB takes exception to the findings in RO paragraphs 47, 48 and 77, arguing that there is no competent, substantial evidence that Ms. Bartlett failed to satisfy the total tax amount underlying the personal liability assessment made pursuant to Section 213.29, F.S., and that $8,750.96 remains due as of March 7, 2018 for the period July 1, 2015 through October 31, 2016. This exception lists paragraph 47 as one to which exception is being taken; however, no argument against the findings in paragraph 47 is provided. While this exception begins with an apparent argument that there is no competent, substantial evidence that VMOB failed to satisfy the tax amount

pertaining to the personal liability assessment, it ends up arguing that there is no competent, substantial evidence that Ms. Bartlett was liable pursuant to Section 213.29, F.S. Ms. Bartlett accepted personal liability for the debts of VMOB in paragraph 19 of the CA when she executed it. To the extent that this exception argues that Section 213.75, F.S., is inapplicable because Ms. Bartlett allegedly made payments on behalf of VMOB from her personal funds, there is nothing in this statute that would support such an interpretation. The ALJ's interpretation of Section 213.75, F.S., is correct, in that this statutory provision dictates the application of funds where liens have been filed without regard to the source of the funds used for payment. There is competent, substantial evidence in the record to support the ALJ's findings of fact in paragraphs 47 and 48. In regard to paragraph 77, the Department is unable to substitute a conclusion of law that is as or more reasonable than that determined by the ALJ. There is competent, substantial evidence in the record to support the ALJ's findings of fact in paragraphs 47 and 48. (VE 1 par. 19; DE 8 par. 19; DE 18: p. 31; DE 34; T. pp. 87-88, 208-210; ss. 213.29 and 213.75, F.S.)

13) VMOB takes exception to the findings in paragraph 82 and the third paragraph under "Recommendation", arguing that there is no competent, substantial evidence that Ms. Bartlett's personal liability assessment is $81,060.04 if $8,750,96 is all that was owed by VMOB at the time of the hearing before the ALJ. The exception seems to further argue that the requirements for a penalty assessment pursuant to Section 213.29, F.S., have not been clearly and convincingly established. There is competent, substantial evidence in the record to support that the requirements for this penalty assessment have been clearly and convincingly established. However, at the time this matter went to hearing, VMOB owed only $8790.56 of the original $40,530.02 unpaid tax liability, having paid $31,779.06 of the original unpaid tax amount. As a consequence, the original penalty of $81,060.04 is reduced (abated) by $31,779.06, leaving a penalty of $49,280.98. This exception is granted in part, as required by the plain meaning of Section 213.29, F.S., and the aforementioned Opinion and Mandate of the Second District Court of Appeal.

14) VMOB takes exception to the findings in paragraph 82 and the third paragraph under "Recommendation", arguing that as a matter of law, Ms. Bartlett's current personal liability must be reduced as a consequence of payments remitted since the original assessment was made. The matters raised in this exception have been addressed in the foregoing paragraph.

15) VMOB takes exception to the findings in paragraphs 19, 20, 30, and 31, arguing that the language in CA paragraph 17 does not support the ALJ's interpretation that the Department can accept an untimely payment and not waive its right to pursue revocation for breaching the CA by untimely payment. It argues the ALJ's findings are inconsistent with Florida law, but does not specify exactly what Florida law is meant thereby. The matters raised in this exception have already been addressed in paragraph 3 above. These findings are consistent with the provisions of the CA and the POA form, both of which were executed by Ms. Bartlett. In addition, VMOB failed to identify the legal basis for this exception, and there is competent, substantial evidence in the record to support the ALJ's findings of fact in paragraphs 19, 20, 30, and 31. In addition, since the CA specifically requires remittance of each payment on or before its due date, and paragraph 17 of the CA allows the Department to waive a breach without waiving other breaches, the Department cannot substitute a conclusion of law that is as or more reasonable than that found by the ALJ. (DE 8: paragraphs 7, 15, and payment schedule; DE 24; VE 1 pp. 1-3, paragraphs 7-10, 15-17; T. pp. 19, 38-39, 46-54, 147-150, 189-190)

16) VMOB takes exception to the findings set forth in endnote 6 that the failure to serve jeopardy notices on the POA was "of no moment", arguing that this conclusion is inconsistent with the POA form, and Florida law regarding POAs. This issue was addressed in the foregoing rulings regarding exceptions numbered 4, 5, 6, 7, and 8. It is clear that VMOB was properly served with the jeopardy notices, and that the POA form provides that receipt by either the taxpayer or the POA constitutes receipt by both the taxpayer and the POA. There is competent, substantial evidence in the record to support the ALJ's findings in endnote 6, and there is no conclusion of law that can be

substituted by the Department that would be as or more reasonable than that determined by the ALJ. (VE 2, p. 2 Sec. 6 of POA; DE 18 p.33)

FINDINGS OF FACT

The Department hereby adopts and incorporates by reference the findings of fact as set forth in the recommended order as the factual findings herein.

CONCLUSIONS OF LAW

The Department hereby adopts and incorporates by reference the conclusions of law as set forth in the recommended order as the conclusions of law herein, with the exception of the modification regarding paragraph 82 pf the recommended order as set forth in the foregoing ruling in paragraph 13 of this order.

DETERMINATION

Accordingly, it is ORDERED:

1) That VMOB, LLC's Certificate of Registration, numbered 39-8016555696-3 is hereby revoked;

2) That the Jeopardy Findings and Notices of Final Assessment dated December 12, 2016 and February 2, 2017 are sustained; and

3) That the Personal Liability assessment issued pursuant to Section 213.29, F.S., against Verna Bartlett is sustained in the amount of $49,280.98 as of January 17, 2018, the date of the hearing before the Division of Administrative Hearings.

ENGAGING IN THE BUSINESS OF SELLING OR LEASING TANGIBLE PERSONAL PROPERTY OR SERVICES OR ACTING AS A DEALER AFTER A CERTIFICATE HAS BEEN REVOKED IS PROHIBITED AND CONSTITUTES A CRIME PUNISHABLE AS PROVIDED IN SECTION 775.082 OR SECTION 775.083, FLORIDA STATUTES.

NOTICE OF RIGHT TO JUDICIAL REVIEW

Any party who is adversely affected by this final order has the right to seek judicial review of the order under section 120.68, Florida Statutes, by filing a notice of appeal under Rule 9.190 of the Florida Rules of Appellate Procedure with the Agency Clerk of the Department of Revenue in the Office of the General Counsel, Post Office Box 6668, Tallahassee, Florida 32314-6668 [FAX (850) 488-7112], **AND** by filing a **copy** of the notice of appeal accompanied by the applicable filing fees with the District Court of Appeal, First District or with the District Court of Appeal in the appellate district where the party resides. **The notice of appeal must be filed within 30 days from the date this order is filed with the clerk of the Department.**

ENTERED in Tallahassee, Leon County, Florida, this 15th day of April, 2020.

State of Florida
DEPARTMENT OF REVENUE

Andrea Moreland

Andrea Moreland
Deputy Executive Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Final Order has been filed in the official records of the Florida Department of Revenue and that a true and correct copy of the Final Order has been furnished by United States mail, both regular first class and certified mail return receipt requested, to VMOB, LLC c/o Verna Bartlett at Tampa Hyde Park Café, 303 South Melville Avenue, Tampa, Florida 33606; c/o William B. Meacham at 308 East Plymouth Street, Tampa, Florida 33603-5957; at POB 342681, Tampa, Florida 33694; and at 317 South Howard Avenue, Tampa, Florida 33606 this 15th day of April, 2020.

Megan Maxwell
Agency Clerk

Copies:

Honorable Linzie F. Bogan
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060

Mark S. Urban
Office of the Attorney General
The Capitol PL-01
Tallahassee, Florida 32399-1050