

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CELLULAR PLUS AND ACCESSORIES,
INC.,

Petitioner,

vs.

Case No. 17-6516

DEPARTMENT OF REVENUE,

Respondent.

_____ /

RECOMMENDED ORDER

This case was heard before Administrative Law Judge Robert L. Kilbride of the Division of Administrative Hearings ("Division"), on June 28, 2018, by video teleconference with sites in Miami and Tallahassee, Florida.

APPEARANCES

For Petitioner: Carlos M. Samlut, CPA,
Qualified Representative
Samlut and Company
550 Biltmore Way, Suite 200
Coral Gables, Florida 33134

For Respondent: Randi Ellen Dincher, Esquire
Office of the Attorney General
Revenue Litigation Bureau
The Capitol, Plaza Level 01
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STATEMENT OF THE ISSUE

Whether the Department of Revenue's ("Department") assessment for sales and use tax, penalty, and interest is valid, correct, and should be upheld.

PRELIMINARY STATEMENT

On February 15, 2016, the Department assessed Cellular Plus and Accessories, Inc. ("Cellular"), with a proposed additional sum due of \$277,620.29, which consisted of \$194,346.98 in tax, \$48,586.76 for a penalty, and \$34,686.55 in interest for the audit period of September 1, 2011, through August 31, 2014. Cellular denied liability.

On June 16, 2017, Cellular submitted a petition to the Department, requesting an administrative hearing to contest the assessment.

On December 5, 2017, the Department referred the petition to the Division for an administrative hearing. Prior to the final hearing, Cellular provided records sufficient to support a compromise of a portion of the assessment.

After reviewing the newly supplied records, the Department issued a revised assessment on June 12, 2018, which reduced the additional sales and use tax owed to \$158,290.02, plus \$39,572.50 for a penalty; and \$55,040.52 in interest, calculated through June 12, 2018, for a total balance due, as of that date, of \$252,903.04.

At the final administrative hearing on June 28, 2018, the Department introduced the testimony of Martha Gregory, tax law specialist for the Department; and Julia Morales, tax auditor for the Department. The Department also introduced 29 exhibits.

Cellular presented the testimony of Erica Torres, a manager at Cellular, and introduced no exhibits into evidence. Per the undersigned's Order entered July 19, 2018, the parties were instructed to file proposed recommended orders no later than August 6, 2018. A Transcript of the hearing was filed with the Division on July 26, 2018.

Unless otherwise noted, all statutory references are to the Florida Statutes and Florida Administrative Code in effect at the time of action.

PROCEDURAL HISTORY AND FINDINGS - ADMISSIONS
Florida Rule of Civil Procedure 1.370(b)

In response to the Department's motion, on February 28, 2018, the undersigned entered an Order Recognizing Matters Deemed Admitted. The Department's Request for Admissions is attached to its Amended Motion for Order Declaring Petitioner Admitted the Department's First Request for Admissions, filed February 15, 2018.

Since Cellular failed to introduce sufficient evidence at the hearing, or grounds for the undersigned to set aside the

Order Recognizing Matters Deemed Admitted, the following facts relevant to this Recommended Order are conclusively established:

A. Cellular owes the Department additional sales tax in the amount of \$48,764.04 from the Northwest Store for the audit period. See Admission VI.(E) on page 6 of 10; Resp. Ex. 18, Bates stamped pp. 083-088.

B. Cellular owes the Department additional sales tax in the amount of \$17,085.01 from Store 411 for the audit period. See Admission VII.(D) on page 6 of 10; Resp. Ex. 18, Bates stamped pp. 071-075.

C. Cellular owes the Department additional sales tax in the amount of \$49,334.74 from the Miami Gardens Store for the audit period. See Admission VIII.(D) on page 7 of 10; Resp. Ex. 18, Bates stamped pp. 076-082.

D. Cellular owes the Department additional sales tax in the amount of \$18,110.53 from the Pembroke Store for the audit period. See Admission IX.(D) on page 7 of 10; Resp. Ex. 18, Bates stamped pp. 089-095.

E. Cellular owes the Department additional sales tax in the amount of \$11,938.23 from the Pine Island Store for the audit period. See Admission X.(D) on page 8 of 10; Resp. Ex. 18, Bates stamped pp. 096-102.

F. Cellular owes the Department additional sales tax in the amount of \$13,057.47 from the Southland Store for the audit

period. See Admission XI.(D) on page 9 of 10; Resp. Ex. 18, Bates stamped pp. 103-109.

Based upon these admissions, it is conclusively established that Cellular owes to the Department \$158,290.02 additional sales tax. The sum owed for penalty and interest was not conclusively established by the admissions.

FINDINGS OF FACT

The undersigned makes the following findings of relevant and material fact:

1. The Department is the agency responsible for administering Florida's revenue laws, including the imposition and collection of state sales and use taxes. §§ 20.21 and 213.05, Fla. Stat.

2. Cellular is a Florida S-corporation, having a principal address and mailing address of 11050 Pembroke Road, Miramar, Florida 33025. Resp. Ex. 4, Bates stamped p. 031.

3. Cellular is a "dealer" as defined under section 212.06(2), Florida Statutes, and is required to collect and remit sales and use taxes to the State. § 212.06(2), (3)(a), Fla. Stat.

4. The Department notified Cellular of its intent to conduct an audit by written notice and the request for specific records mailed on or about October 3, 2014. Resp. Ex. 2.

5. The audit period is September 1, 2011, to August 31, 2014. Resp. Ex. 2, Bates stamped p. 279.

6. Cellular has several locations in Florida where it sells cellular phones, accessories, phone repair services, and minutes for international calling cards to its customers. Cellular also provides services such as money transfers and accepts payments on behalf of Metro PCS. Store locations are in neighborhood business centers and in malls. During the audit period, Cellular had 11 store locations operating in Florida. Resp. Ex. 4, Bates stamped p. 031.

7. Julia Morales is a tax auditor for the Department. She has been employed with the Department for 11 years. Initially, Morales worked as a tax collector. She has held the position of tax auditor since 2011. Morales has a bachelor's degree in finance and also engages in ongoing training with the Department in order to stay current with Florida Statutes and Department rules. Morales performed the audit and prepared the assessment in this case.

8. Early in the audit, Cellular informed the Department that most of its sales were exempt from Florida's sales tax. Morales explained that insufficient sales records were supplied by Cellular to enable the Department to establish the exempt nature of sales transactions, and, therefore, exempt sales were disallowed by the Department. Resp. Ex. 4, Bates stamped p. 033.

9. On September 3, 2015, the Department issued an initial Notice of Intent to Make Audit Changes ("DR-1215") in the total sum due, as of that date, of \$463,677.61 (i.e., \$327,257.39 tax, \$81,814.34 penalty, and \$54,605.88 interest). After receiving the DR-1215, Cellular requested a conference with Morales to review the assessment. The conference was held on November 9, 2015. Resp. Ex. 1, Bates stamped pp. 007-008; Resp. Ex. 4, p. 030; Resp. Ex. 15, Bates stamped p. 131; Resp. Ex. 16, Bates stamped pp. 130-189.

10. After the November 9, 2015, conference, Cellular provided Morales with sales invoices and detailed sales reports for the audit period. Morales explained that the supplemental records established that Cellular's reported tax exempt sales were properly exempt from sales tax, and, therefore, audit assessment Exhibits A01 to A11 were deactivated. Resp. Ex. 4, Bates stamped pp. 029-031; Resp. Ex. 18, Bates stamped pp. 058-068.

11. Audit assessment Exhibit A12 was also deactivated because Cellular provided records needed to reconcile the difference between gross sales reported on its 2012 federal tax return and gross sales reported on the sales and use tax returns for the same period. Resp. Ex. 18, Bates stamped p. 069.

12. Among the supplemental records supplied by Cellular to establish the tax-exempt basis for some of its sales, its monthly

Sales Transaction Detail reports showed that six of Cellular's 11 stores did not remit to the Department all the sales tax they collected during the audit period. Consequently, Morales added audit assessment Exhibits A13 through A18 to document the sales tax collected but not remitted, detailed by store. Resp. Ex. 4, Bates stamped pp. 029-030; Resp. Ex. 18, Bates stamped pp. 070-110.

13. Morales testified that one of Cellular's stores that under-remitted sales tax, namely the Northwest Store, was operating but not registered with the Department for the entire audit period. Morales discovered that the Northwest Store collected sales tax on its sales and did not start to remit collected tax to the Department until September 2014, which was after the audit period. Of the remaining five stores, Cellular remitted to the Department approximately 50 percent of the sales tax it collected from July 2012 to August 2014. Resp. Ex. 18, Bates stamped pp. 075, 082, 088, 095, 102, and 109.

14. As to consumable purchases (audit assessment Exhibit B01) during the audit, Cellular failed to provide records to establish that it paid use tax on consumable purchases. The sums expensed in Cellular's federal tax returns, which could have a sales tax implication, were relied upon by the auditor to create Exhibit B01. Resp. Ex. 4, Bates stamped p. 034; Resp. Ex. 18, Bates stamped pp. 111-125.

15. Based upon the supplemental records supplied after the November 2015 conference, on February 4, 2016, the Department issued a revised Notice of Intent to Make Audit Changes ("DR-1215"), reducing the total sum due, as of that date, to \$277,211.42 (i.e., \$194,346.98 tax, \$48,586.76 penalty, and \$34,277.68 interest). Resp. Ex. 18, Bates stamped p. 053.

16. Penalty considerations were reviewed by the Department. Resp. Ex. 19. Due to Cellular's failure to remit to the State collected sales tax, penalty was not waived by the Department. In addition, accrued statutory interest was also imposed as required by section 213.235, Florida Statutes. Resp. Ex. 18, Bates stamped pp. 054-056; Resp. Ex. 29, Bates stamped p. 2.

17. On February 15, 2016, the Department issued a Notice of Proposed Assessment ("NOPA") in the total sum due, as of that date, of \$277,620.29 (i.e., \$194,346.98 tax, \$48,586.76 penalty, and \$34,686.55 interest). Resp. Ex. 23.

18. On March 18, 2016, Cellular submitted a timely protest letter to the Department's Technical Assistance and Dispute Resolution ("TADR"). Resp. Ex. 25.

19. Martha Gregory also testified for the Department. She has been employed with the Department for 20 years. Gregory currently holds the position of taxpayer services process manager in TADR. Gregory holds a bachelor's degree in accounting and has also taken master's level courses. TADR manages an assessment

after a taxpayer submits a protest of a NOPA with the Department. Gregory is familiar with TADR's involvement in Cellular's case.

20. Gregory testified that despite repeated efforts by TADR during the protest period, Cellular submitted no new information to the Department for review. Consequently, on April 17, 2017, TADR issued a Notice of Decision ("NOD"), sustaining the assessment in its totality. Because of accruing interest, the total sum due, as of that date, increased to \$293,353.77. Resp. Ex. 24.

21. On June 16, 2017, Cellular timely filed its petition for a chapter 120, Florida Statutes, hearing. In its petition, Cellular contests all taxes, penalty, and interest that have been assessed. (See petition filed with the Division on December 5, 2017.)

22. After receiving the petition, the Department made repeated attempts to obtain information from Cellular to support the claims raised in their petition. Resp. Ex. 28.

23. Because no additional information was submitted by Cellular, the petition was referred to the Division on December 5, 2017.

24. Prior to this final hearing of June 28, 2018, Cellular provided additional records relevant to the sales tax assessed on consumable purchases (audit assessment Exhibit B01). Based upon the newly supplied supplemental records, the Department also

deactivated Exhibit B01 from the assessment and issued a revised reduced assessment.

25. As a result, on June 12, 2018, the Department issued a revised assessment, which reduced the additional sales and use tax owed to \$158,290.02, plus \$39,572.50 for a penalty and \$55,040.52 in interest, for a total sum owed, as of that date, of \$252,903.04. Resp. Ex. 29, Bates stamped p. 2.

26. Erica Torres appeared at the hearing as Cellular's corporate representative and testified on Cellular's behalf. Torres is employed by Cellular as a manager in charge of sales personnel, commissions, schedules, and bookkeeping. She has been employed by Cellular since 2001.

27. Torres admitted that the reports relied upon by the Department in determining that Cellular collected and failed to remit sales tax were correct.

28. Cellular introduced no credible or persuasive evidence to support that the assessment was incorrect.

29. The undersigned finds that more credible and reliable evidence is in favor of the Department. Cellular failed to demonstrate by a preponderance of the evidence that the assessment or proposed penalty and interest proven by the Department are incorrect.

CONCLUSIONS OF LAW

30. The Division has jurisdiction over the subject matter and the parties hereto pursuant to sections 120.569, 120.57(1), and 120.80(14).

31. The Department is an agency of the State of Florida and is charged with administering the tax laws of the state. The Department is authorized to conduct audits of all dealers subject to Florida's revenue laws imposed under chapter 212, and to request information to ascertain a dealer's tax liability, if any. If an audit deficiency exists, the Department is authorized to make an assessment and collect the tax. §§ 20.21, 213.05, 212.12(5)(a), 212.13, and 213.34, Fla. Stat.

32. The Department is authorized to prescribe and inspect the books and records kept by all dealers that are subject to sales and use tax. §§ 212.12(5)(a) and 212.12(6)(a), Fla. Stat. Furthermore, dealers are required to keep suitable books and records relating to sales tax and to preserve those books and records. §§ 212.12(6)(a), 212.13, and 213.35, Fla. Stat.

33. As applied here, the term "dealer" is defined to mean every person who sells at retail, or who offers for sale at retail, or who has in his or her possession for sale at retail, or for use, consumption, or distribution, or for storage to be used or consumed in this state, tangible personal property as defined in chapter 212. § 212.06(2)(c), Fla. Stat.

34. Dealers are required to keep suitable books and records relating to sales and use tax and to preserve those books and records. §§ 212.12(6)(a), 212.13, and 213.35, Fla. Stat. When an audit is conducted, only those records and information available when the audit commences are deemed acceptable. § 212.13(5), Fla. Stat.

35. For the audit period, Cellular was a "dealer" as defined under section 212.06, and was required to collect and remit sales tax to the State. Cellular was also responsible for maintaining suitable books and records of its sales.

36. Florida's Legislature has declared that every person who engages in the business of selling items of tangible personal property at retail in the state is exercising a taxable privilege. § 212.05, Fla. Stat. Florida's sales and use tax is a tax on the privilege of engaging in business in the state. §§ 212.05 and 212.06, Fla. Stat.

37. In general, tax laws should be construed strongly in favor of the taxpayer and against the Department, with all ambiguities resolved in favor of the taxpayer. Lloyd Enterprises, Inc. v. Dep't of Rev., 651 So. 2d 735, 739 (Fla. 5th DCA 1995). However, in this case, no material tax law ambiguities or legal disputes concerning the interpretation or application of these tax laws to Cellular have been convincingly raised as an issue in the assessment.

38. The tax imposed under Florida sales and use tax laws is generally imposed on sales and use, admissions, transient rentals and commercial rentals. §§ 212.05 and 212.06, Fla. Stat. Florida sales tax and use tax are separate, but complementary taxes, although they are often referred to as one tax. U.S. Gypsum v. Green, 110 So. 2d 409 (Fla. 1959).

39. Sales tax is imposed at the rate of six percent (plus the discretionary county sales surtax, when applicable) on the sales price of tangible personal property. Sales tax is levied when items are sold at retail in Florida and is computed on each taxable sale for the purpose of remitting the amount of tax due to the State. §§ 212.05(1)(a)1.a. and 212.054, Fla. Stat.

40. Sales and use tax become State funds and property at the moment of collection by the retail outlet. Collected taxes are due to the Department on the first day of the succeeding month and are delinquent on the 21st day of the succeeding month. §§ 212.06(1)(a), 212.11, and 212.15(1), Fla. Stat.; Fla. Admin. Code R. 12A-1.056.

41. In these proceedings, the Department bears the initial burden to demonstrate that the assessment has been made against the taxpayer, and the factual and legal grounds upon which the Department made the assessment. Once this occurs, the burden then shifts to the taxpayer 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, 333 (Fla. 3d DCA 2002).

42. Once the Department has met its initial burden, the burden then shifts to the taxpayer who, in order to prevail, must prove by a preponderance of evidence that the tax assessment is incorrect. Id.; § 120.57(1)(j), Fla. Stat.

43. The Department's burden of proof in cases in which a taxpayer challenges the validity of an assessment is set forth in section 120.80(14)(b)2., which provides in pertinent part:

2. In any such administrative proceeding, the applicable department's burden of proof, except as otherwise specifically provided by general law, shall be limited to a showing that an assessment has been made against the taxpayer and the factual and legal grounds upon which the applicable department made the assessment.

44. If the Department meets its burden, then the taxpayer must establish, also by the greater weight of the evidence, that the assessment is incorrect. IPC Sports, Inc. v. State, Dep't of Rev., 829 So. 2d at 330, 332. The Department met its burden; Cellular did not.

45. In this case, the audit was commenced in October 2014, after the Department sent Cellular a Notice of the Intent to Conduct an Audit. Resp. Ex. 1, Bates stamped p. 003; Resp. Ex. 2, Bates stamped pp. 278-280.

46. On February 28, 2018, the undersigned entered an Order Recognizing Matters Deemed Admitted. At the final hearing, Cellular failed to introduce sufficient or convincing evidence for the undersigned to set aside the Order Recognizing Matters Deemed Admitted. Thus, it is conclusively established that Cellular owes to the Department \$158,290.02 additional sales tax. The sum owed for penalty and interest, however, was not conclusively established by the admissions.

47. In addition to the ruling on the admissions, based upon evidence introduced at the hearing, the Department met its burden and demonstrated that the June 12, 2018, revised sales and use tax assessment of \$158,290.02, plus \$39,572.50 for a penalty and \$55,040.52 in interest, were due for a total sum owed of \$252,903.04, as of June 12, 2018, is correct. There is a proper factual and legal basis for the Department's current assessment, penalty, and interest.

48. When a taxpayer fails to timely remit sales taxes to the State, a penalty is added to the additional tax owed in the amount of ten percent of the unpaid taxes if the delay of remitting taxes is for not more than 30 days. There is an additional ten percent penalty for each additional 30 days while the failure to remit taxes continues, not to exceed a total penalty of 50 percent in the aggregate, of any unpaid tax due. § 212.12(2)(b), Fla. Stat.

49. In this case, Cellular failed to remit collected sales tax for a period in excess of seven years from the start of the audit period. Therefore, the total penalty in the aggregate has accrued to 50 percent of the \$194,346.98 tax due, which is \$97,173.52. Resp. Ex. 18, Bates stamped pp. 054-055; Resp. Ex. 29.

50. A taxpayer's liability for penalty that is more than 25 percent of the tax due shall be compromised if the Department determines that the noncompliance is due to reasonable cause and not to willful negligence, willful neglect, or fraud. § 213.21(3)(a), Fla. Stat. In determining whether further compromise of the penalty is appropriate, a taxpayer's failure to remit collected taxes weighs against further reduction of the penalty. Fla. Admin. Code R. 12-13.007(1)(a)4. and 12-13.0075(2)(a)5.

51. Here, the Department determined that there was not evidence of willful negligence, willful neglect, or fraud. Since the total penalty in the aggregate accrued to 50 percent of the \$194,346.98 tax due (i.e., \$97,173.52 total penalty), the Department waived Cellular's liability for that portion of the total penalty that exceeded 25 percent of the \$194,346.98 tax due and assessed a penalty in the amount of \$48,586.76. In revising the assessment in June 2018, based upon the same calculation, the penalty was reduced to \$39,572.50. Recognizing the Department

conclusively established that Cellular failed to remit collected sales tax, the June 12, 2018, revised assessment's imposition of the \$39,572.50 penalty was correctly assessed. Resp. Ex. 29.

52. When a taxpayer fails to timely remit sales taxes to the State, interest (in addition to the penalty) shall be added to the payment deficiencies, with the rate of interest established pursuant to section 213.235. See also Fla. Admin. Code R. 12-3.0015.

53. A taxpayer's liability for interest may be compromised or adjusted by the Department upon grounds of doubt as to liability or collectability. § 213.21(3), Fla. Stat. A taxpayer's failure to remit collected taxes weighs against a compromise of interest due to doubt as to collectability. Fla. Admin. Code R. 12-13.0075(1)(b)3.

54. Recognizing the Department conclusively established that Cellular failed to remit collected sales tax, there is no reasonable doubt as to liability or grounds as to collectability. Cellular's cumulative liability for interest due is correctly computed per the schedule in Respondent's Exhibit 18, Bates stamped pages 054 through 056, and properly reduced as presented in the June 12, 2018, revised assessment. Resp. Ex. 29, Bates stamped p. 2.

55. Cellular failed to meet its burden and prove that the assessment was incorrect.

56. The assessment of tax, penalty, and interest by the Department is correct and valid.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Revenue enter a final order denying Cellular's requests for relief and sustaining the assessment in its entirety.

DONE AND ENTERED this 22nd day of August, 2018, in Tallahassee, Leon County, Florida.



ROBERT L. KILBRIDE
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Filed with the Clerk of the
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this 22nd day of August, 2018.

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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.