

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHRISTOPHER B. SCOTT,

Petitioner,

vs.

Case No. 18-4464

DEPARTMENT OF REVENUE,

Respondent.

_____ /

RECOMMENDED ORDER

Administrative Law Judge D. R. Alexander conducted a hearing in this case by video teleconference at locations in Tampa and Tallahassee, Florida, on February 6, 2019.

APPEARANCES

For Petitioner: William B. Meacham, Esquire
308 East Plymouth Street
Tampa, Florida 33603-5957

For Respondent: Mark S. Urban, Esquire
Florida Office of Attorney General
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

STATEMENT OF THE ISSUE

The issue is whether Petitioner, Christopher B. Scott, as the managing member of PNC, LLC (PNC), is personally liable for a penalty equal to twice the total amount of the sales and use tax owed by PNC to the State of Florida.^{1/}

PRELIMINARY STATEMENT

On January 18, 2018, the Department issued a Notice of Assessment of Personal Liability (NAPL) to Christopher B. Scott informing him that it intended to assess a penalty in an amount equal to double the sales and use tax owed by PNC for the period February 2013 through October 2014. The NAPL reflects a penalty in the amount of \$158,647.50. Mr. Scott timely requested a hearing to contest this action, and the matter was referred to the Division of Administrative Hearings on August 23, 2018, to resolve the dispute.

At the final hearing, Mr. Scott presented no witnesses but offered Petitioner's Exhibits 1 through 11. Except for page 10 of Exhibit 4, and pages 36, 55, and 76 of Exhibit 10, they were accepted in evidence. The Department presented the testimony of one witness. Respondent's Exhibits 1 through 29 were accepted in evidence.

A one-volume Transcript of the hearing has been prepared. The parties submitted proposed recommended orders (PROs) on April 8, 2019, which have been considered.

FINDINGS OF FACT

1. The Department is the state agency charged with administering and enforcing the laws related to the imposition and collection of sales and use taxes.

2. PNC is a now-dissolved Florida limited liability company that did business under the name "CHEAP" at 309 South Howard Avenue, Tampa, Florida. PNC was registered as a business and filed its Articles of Organization with the Secretary of State on June 16, 2010. Until the company was dissolved by the Secretary of State in 2018 for failure to pay the 2017 annual filing fees, Mr. Scott served as its managing member and had administrative control over the collection and payment of taxes. Verna Bartlett was PNC's controller.

3. PNC was registered with the Department as a dealer pursuant to section 212.18, Florida Statutes, and was issued Sales and Use Tax Certificate of Registration 39-8015401140-8. A certificate of registration requires the taxpayer to file sales and use tax returns and pay to the Department all taxes owed as they are received.

4. After making numerous attempts to collect delinquent sales tax owed by PNC for tax reporting periods in 2013 and 2014, the Department filed this action seeking to impose a personal penalty assessment against Mr. Scott, the managing member of the company.

5. Section 213.29, Florida Statutes, provides that any person who has administrative control over the collection and payment of taxes and who willfully fails to pay the tax or evades the payment of the tax shall be liable to a penalty equal to

twice the amount of tax not paid. The penalty is based only on the taxes owed, and not the interest and fees that have accrued. The statute provides that if the business liability is fully paid, the personal liability assessment will be considered satisfied.

6. On January 18, 2018, the Department issued a NAPL against Mr. Scott after PNC failed to pay the sales and use taxes owed the State for the reporting periods from February 2013 through October 2014. The outstanding taxes, exclusive of interest or penalties, total \$79,325.75. The NAPL imposes a total penalty of \$158,647.50, or twice the amount of sales tax owed by PNC. No payments have been made on the account since the issuance of the NAPL, and, PNC, now closed, currently has a total liability in excess of \$200,000.00.

7. During the relevant time period, Mr. Scott was personally responsible for collecting PNC's sales tax and remitting it to the Department; he had the authority to sign checks on behalf of PNC; he made financial decisions as to which creditors should be paid; he made the decision to use the sales tax collected for the business and for stipulation payments; and he made the decision not to remit the sales tax that was collected. This was confirmed by PNC's controller, Ms. Bartlett, who responded to the Department's Requests for Admissions.

Mr. Scott also confirmed to a Department tax specialist that the admissions provided by Ms. Bartlett were accurate.

8. Mr. Scott either never remitted payment or did not remit payment timely on behalf of PNC for the following reporting periods: February, April, and December 2013, and January through October 2014.

9. Tax warrants were issued and judgment liens were recorded for the following reporting periods: February, April, and December 2013, and January, February, and April through October 2014. Resp. Ex. 5 and 6. All warrants and liens relate to reporting periods that fall within the personal liability assessment period.

10. A Notice of Jeopardy Finding and Notice of Final Assessment (Notice of Jeopardy) dated June 18, 2014, was issued to PNC pertaining to the April 2014 reporting period. Resp. Ex. 11. This notice was issued after Mr. Scott ceased making regular tax payments, the estimated deficiency was substantial, and the Department determined that collection of the tax would be jeopardized by further delay.

11. A Notice of Jeopardy and Notice of Final Assessment dated August 7, 2014, also was issued to PNC pertaining to the April, May, and June 2014 reporting periods. Resp. Ex. 12.

12. Because PNC reported more than \$20,000.00 in sales tax each year, unless a waiver was obtained, Mr. Scott was required

to file and pay PNC's sales tax electronically for all reporting periods within the personal liability period. See § 213.755(1), Fla. Stat.; Fla. Admin. Code R. 12-24.003. Despite having obtained no waiver, Mr. Scott never filed returns or paid PNC's sales tax electronically. And even though he never remitted a payment electronically, Mr. Scott indicated on at least six sales tax returns during the relevant time period that sales tax for the reporting period was remitted electronically. The only conclusion to draw from this action is that Mr. Scott filed or directed the filing of these returns knowing them to be false.

13. The record shows that, dating back to 2011, Mr. Scott has a long-standing history of failing to abide by the tax laws of the state as it relates to PNC. For example, on September 15, 2011, Mr. Scott was referred for criminal investigation by the state attorney for his failure to pay taxes. Also, numerous returns were filed without a payment. This is prima facie evidence of conversion of the money due. § 212.14(3), Fla. Stat. Respondent's Exhibit 1 summarizes numerous contacts by the Department's Tampa District Office with Mr. Scott regarding collection notices, telephone calls, emails, assessment letters, warrant letters, and the like in an effort to secure compliance with tax laws. It is fair to find that Mr. Scott willfully attempted to evade or avoid paying sales and reemployment taxes during the relevant period.

14. To prevent its Sales and Use Tax Certificate of Registration from being revoked, PNC entered into a compliance agreement on July 10, 2013, to pay past due sales tax and reemployment tax totaling \$65,789.25.

15. The agreement required PNC to: (a) accurately complete all past due tax returns and reports no later than July 10, 2013; (b) remit all past due payments in accordance with the attached schedule, which required 11 monthly payments of \$4,000.00 beginning on August 10, 2013, and a final balloon payment on July 10, 2014; (c) accurately complete and file all required tax returns and reports for the next 12 months; and (d) timely remit all taxes due for the next 12 months. A \$15,000.00 down payment also was required to be paid on or before July 10, 2013. An addendum to the agreement (added by Mr. Scott) provided that "[a]ll payments, including the \$15,000.00 down payment, shall first be applied to Sales and Use Tax."

16. Although the down payment was made timely, the agreement was breached the first month (August) because Mr. Scott did not make the payment electronically. However, the agreement was not voided by the Department until October 12, 2013. Therefore, any payments made on or after October 12, 2013, were not considered compliance payments and are not subject to the addendum in the agreement.

17. A somewhat confusing aspect of this dispute concerns Mr. Scott's contention, by way of cross-examination, that contrary to the addendum, the Department incorrectly applied his \$15,000.00 down payment and subsequent compliance payments to the reemployment tax account, rather than the sales tax account, and that his sales tax liability should be reduced by that amount. As noted above, the addendum governs only the payments that predate October 12, 2013, which are the down payment (\$15,000.00) and the August and September payments -- \$4,000.00 each month. This issue was not raised by Mr. Scott until the Department issued a NAPL on April 13, 2017.

18. The NAPL issued on April 13, 2017, indicated that the outstanding tax owed by PNC through October 31, 2014, was \$90,808.17, and the personal assessment was twice that amount. In response to Mr. Scott's request, the Department acknowledged that it incorrectly applied the down payment to the reemployment account. Also, it took a second look at the two payments made in August and September, which predate the voiding of the agreement.

19. The August installment payment consisted of two separate checks: \$3,390.00 for sales tax and \$610.00 for reemployment tax, and these amounts were applied in that manner. The September payment, \$4,000.00, submitted in one check, was applied in the same manner as the August payment, with \$610.00 going to the reemployment tax and the remainder to sales tax.

Therefore, only \$1,220.00 was incorrectly applied to the reemployment tax during those two months.

20. On July 3, 2017, the Department reapplied a total of \$16,551.00 from the reemployment tax account to the sales tax account for the relevant reporting periods.

21. Mr. Scott contends the reapplication of the \$16,551.00 to sales tax should reduce the amount of sales tax due by that amount. However, section 213.75(2) dictates that if a lien or warrant has been filed against the taxpayer, as is true here, the payment shall be applied in a priority order spelled out in the statute. Thus, the Department applied that amount in the following order: against the costs to record the liens against PNC; against the administration collection processing fee, if any; against any accrued interest; against any accrued penalty; and against any tax due. Under this priority order, the penalty/interest/fees categories totaled \$5,066.58, while the tax liability category totaled \$11,484.42. A detailed breakdown of this allocation is found in Respondent's Exhibit 29. Therefore, the total tax liability on the 2017 NAPL (\$90,808.17) is reduced by \$11,484.42, resulting in a total tax liability of \$79,323.75, as shown on the updated 2018 NAPL.

22. In the same vein, in his PRO, Mr. Scott argues that he was not given credit for payments of \$9,110.24, \$2,688.53, \$178.28, and \$1,321.80, which reduce his sales tax liability to

\$66,024.90 and the personal assessment to \$132,049.80. See Pet'r Ex. 10. However, all of these payments (some of which are bank levies) were made after the compliance agreement was voided and do not apply to the reporting periods in this case.

23. By way of cross-examination, Mr. Scott also contends that he was never given an accounting of what PNC owes despite "multiple requests" for the same. The record shows otherwise. On April 13, 2017, the 2017 NAPL was mailed to Mr. Scott, along with a ZT09, a computer-generated form which lists, in detail, a taxpayer's outstanding taxes owed by reporting period. A second copy of a ZT09 was faxed to him the following day. In his May 3, 2017, letter protesting the 2017 NAPL, Mr. Scott alleges that payments were not applied properly. In response, the Department sent a fax to Mr. Scott on May 10, 2017, listing checks that were not honored by the bank and requesting information concerning which payments PNC contends were not applied properly. In his response on May 12, 2017, Mr. Scott did not provide the requested information. On January 17, 2018, the 2018 NAPL was mailed to Mr. Scott, along with a ZT09. Finally, on April 12, 2018, per Ms. Bartlett's request, the Department mailed a ZT09 with the outstanding amounts due.

24. Finally, in its PRO, the Department points out that after the hearing ended, it discovered that it made an error, in Mr. Scott's favor, in calculating his sales tax liability for the

relevant reporting periods. Had it correctly calculated the amount of payments made by PNC, the sales tax liability for the relevant period would be increased from \$79,323.75 to \$84,444.35, which in turn would increase the personal assessment. However, the Department consents to the lower tax and assessed penalty amount, as reflected on the 2018 NAPL.

CONCLUSIONS OF LAW

25. In this case, the Department has the initial burden to show that an assessment was made against Petitioner, and the factual and legal grounds for the assessment are correct. See § 120.80(14)(b)2., Fla. Stat. The burden of persuasion then shifts to Petitioner, who must prove, by a preponderance of the evidence, that the factual and legal bases for the Department's assessment were incorrect or unreasonable. See IPC Sports, Inc. v. State, Dep't of Rev., 829 So. 2d 330, 332 (Fla. 3d DCA 2002). In other words, Petitioner must show the assessment cannot be sustained under any reasonable hypothesis of legality. Harris v. State, Dep't of Rev., 563 So. 2d 97, 99 (Fla. 1st DCA 1990).

26. Section 213.29 provides in part that any person having administrative control over the collection and payment of taxes shall, in addition to any other penalties, "be liable to a penalty equal to twice the total amount of the tax evaded or not accounted for or paid over" to the Department. 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."

27. Respondent demonstrated by a preponderance of the evidence, that PNC owed taxes, interest, and penalties for nonpayment of sales tax for numerous reporting periods. The Department recorded several warrants and liens in an effort to collect on the outstanding taxes. The Department established the correctness of the assessed amounts, and Petitioner did not show that these amounts were incorrect, departed from the requirements of the law, or were unsupported by any reasonable hypothesis of legality.

28. The Department presented evidence sufficient to establish Mr. Scott's willful attempt to evade or defeat his responsibility, as managing member of the taxpayer, to collect and pay sales tax on behalf of PNC. Petitioner did not present evidence to counter this showing.

29. Accordingly, for the reasons set forth above, it is determined that Petitioner, as managing member of PNC, is liable to the Department for a penalty of \$158,647.50, which is twice the total amount of the sales and use tax owed by PNC to the State of Florida. If the business liability is paid, the personal liability assessment against Mr. Scott will be abated.

RECOMMENDATION

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

RECOMMENDED that the Department of Revenue enter a final order determining that Petitioner, Christopher B. Scott, is liable to the Department for a penalty of \$158,647.50.

DONE AND ENTERED this 22nd day of April, 2019, in Tallahassee, Leon County, Florida.



D. R. ALEXANDER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of April, 2019.

ENDNOTE

^{1/} By agreement of the parties, the original style of the case has been changed to reflect Mr. Scott as the only petitioner.

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.