STATE OF FLORIDA
DEPARTMENT OF REVENUE

CHRISTOPHER SCOTT,

Petitioner,

vs.

DOAH Case Number: 18-4464
DOR Final Order No.:

DEPARTMENT OF REVENUE,

Respondent.
_____/

FINAL ORDER

This cause came before the State of Florida, Department of Revenue ("Department") for the purpose of issuing a Final Order. Administrative Law Judge ("ALJ") D.R. Alexander, assigned by the Division of Administrative Hearings ("DOAH") to hear this cause, submitted a Recommended Order to the Department on April 22, 2019. A copy of the Recommended Order is attached as Exhibit 1.

The deadline for filing exceptions to the Recommended Order was May 7, 2019. Petitioner timely filed twenty-one (21) exceptions to the Recommended Order on May 7, 2019. The Department timely filed its Response to Petitioner's Exceptions to the Recommended Order ("Response") on May 17, 2019.

STATEMENT OF THE ISSUE AND PRELIMINARY STATEMENT

The Department adopts the Statement of the Issue and Preliminary Statement in the Recommended Order.

FINDINGS OF FACT

The Department is bound by the findings of fact in the Recommended Order unless, following a review of the entire record, the Department can determine that a finding of fact is not based on competent, substantial evidence or that the proceedings did not comply with the essential requirements of law. Section 120.57(1)(l), Florida Statutes. To reject a finding of fact, it is not enough to merely conclude that a finding is not supported by competent, substantial evidence. Rather, a rejection of a factual finding requires identifying the reasons for the rejection with particularity. *Id.*; *Prysi v. Department of Health*, 823 So.2d 823, 825 (Fla. 1st DCA 2002). If the evidence presented at the final hearing may support inconsistent findings, it is the role of the Administrative Law Judge to determine which finding is best supported by the evidence. It is not an agency's role, following issuance of a recommended order, to reweigh the evidence presented or to reconsider the credibility of witnesses. *Walker v. Board of Professional Engineers*, 946 So.2d 604, 605 (Fla. 1st DCA 2006) (per curiam).

Petitioner's exceptions 1-13 are directed to various findings of fact in the Recommended Order. The Department will address these in turn.

Petitioner's First Exception takes issue with the portion of Finding of Fact 6 that states "[o]n 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." Petitioner asserts that this finding of fact is unsupported by competent, substantial evidence. A review of the record reveals that at the time the January 18, 2018 NAPL was issued, it is undisputed that the sales and use taxes owed for February 2013, April 2013, and March 2014 had been paid pursuant to a compliance agreement. As the Department notes in its Response, Petitioner has satisfied its tax liabilities for February and April of 2013 and March of 2014.

However, interest liabilities for those periods remained. Accordingly, the first sentence of Finding of Fact 6 is amended to read:

> On January 18, 2018, the Department issued a NAPL against Mr. Scott after PNC failed to pay the sales and use taxes and related penalties, interest, and fees, owed the State for the reporting periods from February 2013 through October 2014.

Petitioner's Second Exception takes issue with the portion of Finding of Fact 6 that states "[t]he 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." Petitioner asserts that this finding of fact is unsupported by competent, substantial evidence. A review of the record reveals competent, substantial evidence to support this portion of Finding of Fact 6, with the caveat that an apparent scrivener's error is corrected to reflect that the amount of taxes owed is $79,323.75, not $79,325.75. *See, e.g.*, RE2; Tr. 32. Petitioner's assertions that various payments were not properly credited to his tax liabilities are unsupported and apparently were not found to be credible by the ALJ. The remainder of Petitioner's Second Exception asserts that the Department failed to prove various matters by clear and convincing evidence. In reviewing a Recommended Order, the Department is without authority to reweigh the evidence considered by an ALJ, who found that the Department met its evidentiary burden in this matter. Accordingly, Petitioner's Second Exception is rejected.

Petitioner's Third Exception takes issue with the portion of Finding of Fact 7 that states that Mr. Scott:

> 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.

Petitioner asserts that this finding of fact is unsupported by competent, substantial evidence, and specifically that this finding of fact mischaracterizes Mr. Scott's response to the request for admissions served on him by the Department in this proceeding. The Department, in its Response, concedes the specific point that Mr. Scott, not Ms. Bartlett, answered the request for admissions. It seems that the reference to the "Department's Requests for Admissions" in Finding of Fact 7 is a scrivener's error – while the Department's Proposed Recommended Order referred to admissions by the controller of PNC relating to its failure to remit sales taxes, that the sales taxes were subject to Petitioner's control, and that collected sales taxes were used for business purposes as opposed to being remitted to the state, these admissions were not in the form of a response to a request for admissions as that term is used in rules relating to discovery in litigation. However, a review of the record reveals competent, substantial evidence to support the substance of Finding of Fact 7, excepting the reference to the document signed by the controller of PNC as the "Department's Request for Admissions." In other words, the substance of Finding of Fact 7 is well-supported by evidence in the record. *See* Tr. 37-41; RE4 at 47. Accordingly, Petitioner's Third Exception is accepted in part and rejected part. Finding of Fact 7 is revised to read as follows:

> 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 admitted as much in the course of the Department's Personal Liability Assessment Interview. Mr. Scott also confirmed to a Department tax specialist that the admissions provided by Ms. Bartlett were accurate.

Petitioner's Fourth Exception takes issue with the portion of Finding of Fact 8 that states that "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." Petitioner asserts that this finding of fact is unsupported by competent, substantial evidence because PNC paid sales and use taxes for February 2013, April 2013, and March 2014. However, Petitioner offers no support for the contention that the taxes for these three months were *timely* paid. The Department presented evidence to show that these payments were not made or were not made in a timely fashion. *See, e.g.*, RE7, RE8, and RE13. Accordingly, Petitioner's Fourth Exception is rejected.

Petitioner's Fifth Exception takes issue with the entirety of Finding of Fact 9. Petitioner asserts that this finding of fact is unsupported by competent, substantial evidence, and that the finding that "Mr. Scott indicated on sales tax returns during the relevant time period that sales tax for the reporting period was remitted electronically" is unsupported by any evidence in the record. A review of the record reveals sufficient evidence to support Finding of Fact 9 in its entirety. *See, e.g.,* RE1; RE7; Tr. 21-24. Accordingly, Petitioner's Fifth Exception is rejected.

Petitioner's Sixth Exception takes issue with Finding of Fact 13, which identifies "Mr. Scott's long-standing history of failing to abide by the tax laws of the state as it relates to PNC" and concludes that Mr. Scott "willfully attempted to evade or avoid paying" applicable taxes due. Petitioner asserts that this finding of fact is unsupported by competent, substantial evidence, and points to correspondence with the Department requesting various transaction details for the PNC account. Finding of Fact 13 refers to extensive evidence to support the factual findings therein, including Ms. Scott's willfulness in attempting to evade or avoid paying all relevant taxes due, which can be proven by circumstantial evidence. *See Bartlett v. State*, 765 So.2d 799, 800-801 (Fla. 1st DCA 2000) (noting that felonious intent to steal can be demonstrated by circumstantial evidence). As pointed out above, it is not an agency's role, following issuance of a recommended

order, to reweigh the evidence presented at a hearing. Accordingly, Petitioner's Sixth Exception is rejected.

Petitioner's Seventh Exception takes issue with Finding of Fact 16, which found that Mr. Scott breached a Compliance Agreement with the Department in August of 2013 and which the Department canceled on October 12, 2013, meaning that payments submitted after that date were not compliance payments subject to the Compliance Agreement. Petitioner asserts that there is no competent, substantial evidence to support this finding. In support of this assertion, Petitioner relies heavily on the recommended order entered in *Dep't of Revenue v. PNC, LLC, d/b/a Cheap*, DOAH Case No. 14-2538 (November 3, 2014), which according to Petitioner made no finding about whether the August 2013 payment was made in accordance with the Compliance Agreement and states that all past due tax liabilities owed by Petitioner and covered by the compliance agreement were satisfied. A review of the record reveals sufficient evidence to support Finding of Fact 16. *See, e.g.*, Tr. 46. Additionally, the language in the recommended order that Petitioner cites to out of context as a basis for this exception is *not* inconsistent with Finding of Fact 16. That recommended order explicitly made no findings relating to any tax liabilities that post-date the Department's October 12, 2013, cancelation of the agreement following Petitioner's breach. *See* RE 26, en. 2, 3, and 5. Accordingly, Petitioner's Seventh Exception is rejected.

Petitioner's Eighth Exception, directed to Finding of Fact 17, is substantially identical to Petitioner's Seventh Exception. Petitioner takes issue with the finding that the addendum to the compliance agreement did not apply to payments received by the Department after October 12, 2013, when the Department canceled the compliance agreement following a breach by Petitioner. Petitioner cites to the same language from a previous recommended order in support of this exception as cited in his Seventh Exception. A review of the record reveals sufficient evidence to

support Finding of Fact 17. *See* Tr. 46. Additionally, the language in the recommended order that Petitioner cites to out of context as a basis for this exception is not inconsistent with Finding of Fact 17. *See* RE 26, en. 2, 3, and 5. Accordingly, Petitioner's Eighth Exception is rejected.

Petitioner's Ninth Exception takes issue with Finding of Fact 19, which identifies portions of payments made under the compliance agreement that Petitioner asserts were improperly allocated between sales tax and reemployment tax liabilities. The language from the recommended order entered in Case No. 14-2358 that Petitioner cites to does not address the propriety or impropriety of how payments received by the Department were allocated, and does not address the accuracy of Finding of Fact 19, and specifically whether the referenced payments were properly allocated between sales tax and reemployment tax liabilities. Accordingly, Petitioner's Ninth Exception is rejected.

Petitioner's Tenth Exception takes issue with Finding of Fact 20, which states that "[o]n 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." Petitioner asserts that this finding is not supported by competent, substantial evidence. It is. Petitioner conflates the application of payments to a tax account with the application of payments to a tax liability. As was clear in this case, the liabilities associated with Petitioner's tax accounts included interest and penalty liabilities. Portions of the referenced payments were required by law to be applied to costs, interest, and penalty liabilities. Tr. 59-62; RE 27. *See also* Recommended Order at ¶ 21. Accordingly, Petitioner's Tenth Exception is rejected.

Petitioner's Eleventh Exception takes issue with Finding of Fact 22, which states in relevant part that:

> 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.

Petitioner asserts that this finding is not supported by competent, substantial evidence, and relies on the recommended order entered in Case No. 14-2358 to assert that "all past due tax liabilities covered by the compliance agreement" had been satisfied by Petitioner. As pointed out above, Petitioner's reliance on that recommended order is misplaced, as it did not make any findings about any payments made after the Department canceled the agreement in October of 2013 following Petitioner's breach. Accordingly, Petitioner's Eleventh Exception is rejected.

Petitioner's Twelfth Exception takes issue with Finding of Fact 23. Petitioner proposes to substitute the factual findings about the information on tax and related liabilities provided to Petitioner by the Department with his own narrative. Petitioner's objection to the finding that he contended that he was "never given an accounting of what PNC owes" as opposed to "a complete detail of all [of Petitioner's] transactions on this account" is a semantic distinction without meaning for the purposes of this proceeding – the language in Finding of Fact 23 does not purport to be a direct quote. A review of the record reveals that Finding of Fact 23 is supported by competent substantial evidence. Accordingly, Petitioner's Twelfth Exception is rejected.

Petitioner's Thirteenth Exception takes issue with Finding of Fact 24, which states that

> ...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.

This is not a factual finding, but rather repeats the Department's position as presented in the Department's Proposed Recommended Order. The Recommended Order apparently does not

adopt or reject the Department's position based on the Department's post-hearing review of the Petitioner's tax account. Petitioner's basis for the exception does not address whether the Department asserted it had made a mistake in calculating Petitioner's tax liabilities. Accordingly, Petitioner's Thirteenth Exception is rejected.

Subject to the foregoing revisions, the Department adopts the Findings of Fact in the Recommended Order as if set forth herein.

CONCLUSIONS OF LAW

The Department may reject or modify the Conclusions of Law over which it has substantive jurisdiction if the Department can state with particularity why a substituted or revised conclusion of law is as, or more, reasonable that the conclusion of law that was rejected or modified. Section 120.57(1)(l), Florida Statutes; *Barfield v. Dep't of Health, Board of Dentistry*, 805 So.2d 1008 (Fla. 1st DCA 2001).

Petitioner's exceptions 14-21 are directed to various conclusions of law and ultimate findings of fact in the Recommended Order. The Department will address these in turn.

Petitioner's Fourteenth Exception takes issue with the conclusion of law contained in Finding of Fact 5. That paragraph summarizes the relevant provisions of section 213.29, Florida Statutes, as stating 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.

The Petitioner's exception appears to be centered on the points that persons who willfully fail to collect taxes or who willfully direct employees to fail to collect or pay taxes may *also* be liable for penalties under section 213.29, Florida Statutes. Petitioner does not point specifically to what in

this conclusion of law Petitioner finds to be objectionable. Accordingly, Petitioner's Fourteenth Exception is rejected.

Petitioner's Fifteenth Exception takes issue with the conclusion of law in Finding of Fact 5 which states that "if the business liability is fully paid, the personal liability assessment will be considered satisfied." The language in section 213.29, Florida Statutes, cited by Petitioner supports this conclusion of law. Accordingly, Petitioner's Fifteenth Exception is rejected.

Petitioner's Sixteenth Exception takes issue with Finding of Fact 21, and posits that if a portion of payments received by the Department for tax and other liabilities for which liens or warrants have been filed are applied in accordance with section 213.75(2), Florida Statutes, then Mr. Scott is paying "a penalty on interest and fees, which is inconsistent with Florida law." This is an unsupported contention, as Florida law is clear that where a lien or warrant has been filed against a taxpayer, payments received must be applied first to the costs of recording the lien or warrant, next to processing fees, then to accrued interest, then to accrued penalties, and lastly to any tax due. Section 213.75(2), Florida Statutes. Finding of Fact 21 is not inconsistent with Florida law. Accordingly, Petitioner's Sixteenth Exception is rejected.

Petitioner's Seventeenth Exception takes issue with the restatement in Conclusion of Law 25 of the burdens of proof and persuasion applicable to taxpayer contests of tax penalty assessments. Conclusion of Law 25 correctly sets out the applicable burdens of proof and persuasion. *See* section 120.80(14)(b), Florida Statutes, and *IPC Sports, Inc., v. Dep't of Revenue*, 829 So.2d 330, 332 (Fla. 3d DCA 2002). Accordingly, Petitioner's Seventeenth Exception is rejected.

Petitioner's Eighteenth Exception takes issue with Conclusion of Law 26, which states:

> 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."

Petitioner points out that that section only permits the imposition of a tax penalty on persons who willfully fail to collect, account for, or remit sales taxes, or who otherwise willfully evade or avoid taxes due. Given Finding of Fact 5 of the Recommended Order, it is clear that Conclusion of Law 26 did not assert that a person who has administrative control over the collection and payment of taxes may be subject to tax penalties absent willful misconduct -- that provision was being presented "in part." Accordingly, Petitioner's Eighteenth Exception is rejected.

Petitioner's Nineteenth Exception takes issue with Conclusion of Law 27, which states that the Department:

> 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.

This exception is based on Petitioner's objection to the applicable burdens of persuasion and proof, which Petitioner reiterates. Because the Recommended Order correctly states the applicable evidentiary burdens in Conclusion of Law 25 and is supported by competent substantial evidence in the record, Petitioner's Nineteenth Exception is rejected.

Petitioner's Twentieth Exception takes issue with Conclusion of Law 28, which states that 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.

Petitioner asserts that this finding is inconsistent with section 213.29, Florida Statutes. The Recommended Order found that Petitioner had administrative control over the collection and payment of taxes for PNC (Finding of Fact 5) and that he was responsible for collecting taxes owed (Finding of Fact 7), and that he willfully attempted to evade or defeat his responsibility to pay sales tax owed. Petitioner's conduct, as reflected in the Findings of Fact of the Recommended Order fall squarely within section 213.29, Florida Statutes. Accordingly, Petitioner's Twentieth Exception is rejected.

Petitioner's Twenty-first Exception takes issue with Conclusion of Law 29, which states in pertinent part 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.

Petitioner does not make any demonstration as to why this ultimate finding of fact is inappropriate as a matter of fact or law. This paragraph is supported by competent, substantial evidence, and accurately reflects the law on tax penalty assessments as it was applied to Petitioner's case. Accordingly, Petitioner's Twenty-first Exception is rejected.

The Department adopts the Conclusions of Law in the Recommended Order as if set forth herein.

Accordingly, it is ORDERED that the Department's penalty assessment against Petitioner, in the amount of $158,647.50, is SUSTAINED. Petitioner is liable to the Department for a tax penalty in the amount of $158,647.50.

DONE AND ENTERED in Tallahassee, Leon County, Florida this 27th day of June, 2019.

STATE OF FLORIDA
DEPARTMENT OF REVENUE

Andrea Moreland

ANDREA MORELAND
DEPUTY EXECUTIVE DIRECTOR

NOTICE OF RIGHT TO JUDICIAL REVIEW

Any party to this Order has the right to seek judicial review of the Order pursuant to Section 120.68, Florida Statutes, by filing a Notice of Appeal pursuant to Rule 9.110 Florida Rules of Appellate Procedure, with the Agency Clerk of the Department of Revenue in the Office of the General Counsel, P.O 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 appropriate District Court of Appeal. **The Notice of Appeal must be filed within 30 days from the date this Order is filed with the Clerk of the Department**.

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