

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

VMOB, LLC,

Petitioner,

vs.

Case No. 18-5005

DEPARTMENT OF REVENUE,

Respondent.

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RECOMMENDED ORDER

On March 28, 2019, Hetal Desai, Administrative Law Judge of the Division of Administrative Hearings (DOAH), held a final hearing in this cause by video teleconference with sites in Tampa and Tallahassee, Florida.

APPEARANCES

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

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

STATEMENT OF THE ISSUE

Whether factual and legal grounds support the Department of Revenue's jeopardy findings and assessment, dated May 26, 2017.

PRELIMINARY STATEMENT

On May 26, 2017, the Department of Revenue (Department), pursuant to section 213.732, Florida Statutes (2017), issued a Notice of Jeopardy Finding (Jeopardy Finding) and a Notice of Final Assessment (Assessment) to VMOB, LLC, d/b/a Cheap on Howard (VMOB). The Jeopardy Finding alleged collection of the associated tax, penalty, fees, and interest would be jeopardized by delay based on the dishonored checks issued for payment.<sup>1/</sup> The Assessment was in the amount of \$16,606.17.

On August 14, 2017, at 9:56 p.m., VMOB faxed to the Department a letter protesting the Jeopardy Finding and Assessment. The letter alleged VMOB did not receive adequate notice of the May 26, 2017, notices. The Department eventually allowed VMOB to pursue an administrative remedy.

On September 19, 2018, the Department transferred the matter to DOAH, where it was assigned to an administrative law judge and set for hearing. After one continuance, a final hearing was set for March 28, 2019.

An Order granting the Department's Request to Take Judicial Notice was entered December 10, 2018, and the undersigned takes official recognition of a tax warrant recorded in the official records of Hillsborough County, Florida; and the Recommended Order and Final Orders in consolidated DOAH Case Nos. 17-3452

and 17-3630. A pre-hearing conference was held March 22, 2019, by telephone.

At the final hearing, the Department called one witness, Rolinda Smoak, and offered Respondent's Exhibits 1 through 19, which were admitted into evidence. VMOB called one witness, Verna Bartlett, and admitted Petitioner's Exhibits 1 through 5, which were admitted into evidence.

At the conclusion of the hearing, the parties indicated a transcript would be ordered. The parties agreed to submit their proposed recommended orders (PROs) 30 days after the filing of the transcript.

The Transcript was filed on April 11, 2019. Respondent requested an extension to file its PRO, which was granted. Both parties timely filed PROs on May 13, 2019, which have been considered.

Unless otherwise indicated, all rule and statutory references are to the 2017 versions.

#### FINDINGS OF FACT

##### Parties and People

1. The Department is the state agency responsible for implementing and administering the revenue laws of the State of Florida, including the laws relating to the imposition and collection of the state's sales and use tax, pursuant to chapter 212, Florida Statutes.

2. VMOB is a Florida limited liability company with its principal address at 317 South Howard Avenue, Tampa, Florida 33606; and its mailing address and tax registration address as Post Office Box 342681, Tampa, Florida 33694. For the purposes of these proceedings VMOB is the taxpayer.

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

4. Lewis Mustard became VMOB's Power of Attorney (POA) in October of 2016.

Notice to VMOB

5. Pursuant to the Department's "Power of Attorney and Declaration of Representative" form submitted by VMOB (POA form), receipt of notices or other written communications "by either the representative or the taxpayer will be considered receipt by both."

6. The POA form further provides that "[c]ertain computer-generated notices and other written communications cannot be issued in duplicate due to certain system constraints. Therefore, [the Department] will send these communications to only the taxpayer at his or her tax registration address."

7. The notices of the Jeopardy Finding and Final Assessment in this case were mailed together to VMOB's mailing address via certified mail and regular USPS mail. The certified

mailing was returned unclaimed; the regular USPS mailing was not returned.

8. Ms. Bartlett acknowledged receiving the notices and eventually brought this protest.

9. The undersigned finds VMOB received notice of the Jeopardy Finding and Assessment.

#### VMOB's Electronic Filings

10. Beginning January 2016, VMOB was required to file and pay its sales tax electronically, unless it received a waiver. See § 213.755(1), Fla. Stat.; Fla. Admin. Code R. 12-24.003.

11. The Department established at the hearing that it repeatedly made VMOB aware of the electronic filing requirement. For example, each tax bill sent to VMOB indicated payment was to be made electronically; and Department staff explained the electronic filing and payment requirements to Ms. Bartlett on August 18, 2015.

12. On April 29, 2016, the Department sent a fax to Ms. Bartlett, which included a reminder of the electronic filing and payment requirement. In response, Ms. Bartlett stated, "I will begin filing electronically with the May [2016] sales tax return."

13. On December 29, 2016, the Department also notified VMOB's POA of the electronic filing and payment requirement.

14. Ms. Bartlett believed that as long as she paid a penalty, she did not have to file tax returns or tax payments electronically. However, there was insufficient evidence to support this belief.

15. The undersigned finds VMOB has never filed or paid its sales tax electronically.

VMOB's Tax Jeopardy

16. VMOB issued worthless checks for sales tax due for the periods of June 2016, July 2016, and September 2016 through February 2017. As of May 26, 2017, the date of the Jeopardy Finding, the dishonored checks for these time periods had not been satisfied, and VMOB had an outstanding tax liability totaling \$104,853.60.

17. VMOB's April 2017 sales tax payment was due no later than May 20, 2017. See § 212.15(1), Fla. Stat. The April 2017 payment had not been received by the Department as of May 26, 2017.

18. The competent and credible evidence establishes that as of May 26, 2017, payment of the March 2017 and April 2017 sales tax was jeopardized by delay. Payment of VMOB's sales tax remains in jeopardy given that VMOB has yet to submit payment requirements through electronic filing, and as of the date of the hearing, these liabilities were still outstanding.

19. As a result, the undersigned finds the Department properly issued the Jeopardy Finding.

VMOB's Tax Liability

20. The sales tax reporting periods at issue in the Jeopardy Findings and Assessment are March 2017 and April 2017.

21. The total tax due for the March 2017 reporting period, as reflected on VMOB's sales tax return and as reflected on the Assessment, is \$6,668.73.

22. The total tax due for the April 2017 reporting period, as established at the hearing, is \$5,651.75.<sup>2/</sup>

23. VMOB issued check number 40552 in the amount of \$6,668.73 from a Suntrust Bank account on April 20, 2017.

24. VMOB issued check number 40553 in the amount of \$5,651.75 from a Suntrust Bank account on May 22, 2017.

25. Both of these checks (for VMOB's March and April 2017 sales tax payments) were dishonored by Suntrust Bank with the notation "Return Reason - Unable to Locate Account."

26. Ms. Bartlett contends she was unaware worthless checks were being issued for the June 2016 through April 2017 periods until late May or early June of 2017. Given the undisputed evidence regarding the efforts by the Department to obtain payment, this contention is implausible. For example, for each returned check (June 2016, July 2016, September 2016 through February 2017, March 2017 and April 2017), the Department

automatically mailed out a bill to VMOB at its mailing address. There was no evidence VMOB did not receive these bills.

27. On November 28, 2016, the Department explained to VMOB's POA that VMOB was writing worthless checks to the Department. On December 28, 2016, the Department informed VMOB's POA that Ms. Bartlett continued to pay with worthless checks.

28. Even if it is true that Ms. Bartlett was not aware of the worthless checks being used to pay VMOB's taxes, any lack of knowledge was due to her own misfeasance. Ms. Bartlett admits that from October 2016 through April 2017, she did not have adequate oversight over or involvement with VMOB. She did not monitor its checking accounts or finances; she left pre-signed blank checks for her staff, and she did not ask staff for an accounting.

29. Ms. Bartlett's testimony is further undermined by her own correspondence to the Department, dated January 30 and February 27, 2017, in which Ms. Bartlett acknowledges notices of assessment of personal liability and personal jeopardy. She, therefore, had to be aware at that point there was a problem with VMOB's banking accounts and the methods of paying its tax liabilities.

30. Even after Ms. Bartlett discovered the checks used to make the March and April 2017 tax payments had not been honored



by the bank, VMOB made no efforts to pay the tax liability amount.

#### CONCLUSIONS OF LAW

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

32. The Department is an agency of the State of Florida lawfully created and organized pursuant to section 20.21, Florida Statutes, and is vested with the responsibility of implementing and administering the revenue laws of the State of Florida. This includes the laws relating to the imposition and collection of the state's sales and use tax, pursuant to chapter 212.

33. The Department's burden of proof "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." § 120.80(14)(b)2., Fla. Stat. "Once the Respondent has met this initial burden of proof, the burden shifts to the taxpayer to demonstrate by a preponderance of the evidence that the assessment is incorrect." IPC Sports, Inc. v. State, Dep't of Rev., 829 So. 2d 330, 332 (Fla. 3d DCA 2002).

34. In accordance with sections 212.15(1) and (2), the taxes imposed pursuant to chapter 212 become state funds at the

moment of collection, and the intentional failure to remit these taxes constitutes theft of state funds.

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

36. Pursuant to section 213.755(1), and the Department's rules, VMOB was required to file returns and remit payments by electronic means, unless first obtaining a waiver. Because VMOB failed to do so and, thus, violated this requirement, the Department was justified in issuing the Jeopardy Finding.

37. The Department proved by clear and convincing evidence that the sales and use taxes owed by VMOB were in jeopardy at the time of issuance of the notice and, accordingly, the Department's Jeopardy Finding and Assessment for this period are sustained. See § 213.732(2), Fla. Stat.; Fla. Admin. Code R. 12.21.005(1).

38. The total tax due for the March 2017 reporting period, as reflected on VMOB's sales tax return and as reflected on the Assessment, is \$6,668.73.

39. The total tax due for the April 2017 reporting period, as reflected on the Assessment, is \$8,258.92. Because the April 2017 sales tax return and payment were late, the Department,

pursuant to section 212.14, estimated the total tax due at \$8,258.92. However, the actual amount of tax due, as reflected on VMOB's late-filed sales tax return, is \$5,651.75.

40. The total tax amount VMOB owes, without penalties or interest, for March and April 2017 is \$12,320.48.

41. The Department is entitled to impose an additional amount for the penalties and interest that have accrued on the outstanding March and April 2017 tax amount. §§ 213.235 and 213.24, Fla. Stat.; Dep't of Revenue Tax Information Publication No. 17ADM-02 (November 15, 2017).

#### Due Process

42. VMOB alleges a due process violation because the Jeopardy Finding and the Assessment were contained within the same mailing. More specifically, VMOB contends that because the time to review the Jeopardy Finding and the time to challenge the Assessment started running at the same time, VMOB would conceivably not have the results of the jeopardy review before the time to challenge the Assessment had lapsed. Regardless, Petitioner has not been prejudiced because nothing prohibits VMOB from informally or formally challenging the Assessment prior to receiving the results of a jeopardy review. Finally, the issue is moot because VMOB has had the opportunity to challenge the Assessment, and a formal administrative hearing has been conducted. Thus, it was not a violation of VMOB's due

process rights for the Department to send the notices for the Jeopardy Finding and the Assessment in the same mailing. See generally, Gosciminski v. State, 262 So. 3d 47, 59 (Fla. 2018) (finding no procedural due process violation where defendant was given notice and had an opportunity to be heard).

RECOMMENDATION

Based on the foregoing Findings of Facts and Conclusions of Law, it is RECOMMENDED that the Department of Revenue enter a final order: (1) Sustaining the May 26, 2017, Notice of Jeopardy Finding; and (2) Issuing an Assessment for March and April 2017 in the amount of \$12,320.48 with penalties and interest.

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



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HETAL DESAI  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 22nd day of May, 2019.

ENDNOTES

1/ The Notice of Jeopardy Finding alleged the following facts:

- The collection of the amount the Department has determined to be due will be jeopardized by delay.
- The taxpayer has failed to satisfy a dishonored check and/or failed electronic payment transaction.

2/ The April 2017 tax figure is different than what is reflected on VMOB's April 2017 sales tax return, because the return was filed late by VMOB. The Department is authorized to estimate any unpaid deficiencies in tax to be assessed against the sales tax dealer upon such information as may be available to it, and to issue a delinquent tax warrant for the collection of such tax, interest, or penalties estimated to be due and payable, and such assessment is deemed prima facie correct, but the testimony at the hearing established the actual amount. § 212.14, Fla. Stat.

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.