STATE OF FLORIDA DEPARTMENT OF REVENUE
TALLAHASSEE, FLORIDA

VMOB, LLC,

Petitioner,

vs.

DEPARTMENT OF REVENUE,

Respondent.

DOAH Case Number: 18-5005
BP Number: 4432631

FINAL ORDER

This cause came before the State of Florida, Department of Revenue ("Department") for the purpose of issuing a Final Order. The Administrative Law Judge ("ALJ") assigned by the Division of Administrative Hearings ("DOAH") heard this cause and submitted a Recommended Order ("Order") to the Department. A copy of the Order, issued on May 22, 2019 by Judge Hetal Desai, is attached to this order and incorporated by reference as if fully set forth herein as Exhibit 1.

The deadline for filing exceptions to the Order with the Department was June 6, 2019. A copy of Petitioner's Exceptions to Recommended Order (excluding attachments) is attached to this order as Exhibit 2. Petitioner's exceptions were timely filed. Respondent did not file exceptions, or responses to Petitioner's exceptions. The Department has jurisdiction in this cause.

RULINGS ON EXCEPTIONS

On May 31, 2019, Petitioner filed its exceptions to the Order with the Department. Pursuant to subsection 120.57(1)(k), Florida Statutes ("F.S."), a Final Order issued as a result of a Recommended Order:

> [S]hall 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. Petitioner's exceptions have been properly identified as required by the aforementioned statute, and must be ruled upon.

Pursuant to subsection 120.57(1)(l), F.S., when issuing a Final Order based upon a Recommended Order:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, 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. The agency may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefor in the order, by citing to the record in justifying the action.

In ***De Groot v. Sheffield***, 95 So.2d 912 (Fla. 1957), the Florida Supreme Court defined 'competent substantial evidence' as "...such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred" or such evidence that is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." 95 So.2d at 916. ***Heifetz v. Department of Business Regulation, Div. of Alcoholic Beverages & Tobacco,*** 475 So.2d 1277 (Fla 1st DCA 1985); ***J.S. v. Dept. of Children & Families***, 18 So.3d 1170 (Fla. 1st DCA 2009).

Exception Number One

Petitioner's exception number one is denied, as there is competent, substantial evidence to support the ALJ's statement in the second sentence of the 1st paragraph under Preliminary Statement. Jeopardy exists when a dishonored check remains unsatisfied following a long history of non-compliance that includes an existing liability. The determination that the state's money was in jeopardy was ultimately substantiated by the fact that the Petitioner still had not satisfied the March and April 2017 dishonored check 'payments' as of the date of the disputed fact hearing in March 2019. [Transcript pages 31-32]

Exception Number Two

Petitioner's exception number two is denied, as there is competent, substantial evidence to support the ALJ's finding of fact in paragraph 14 that Ms. Bartlett believed she did not have to file and pay her sales tax collections electronically as long as she paid the penalty. Ms. Bartlett testified "...I have a penalty if I choose not to do electronic, but it's another way to pay." [Transcript pages 64, 87-88]

Exception Number Three

Petitioner's exception number three is denied, as there is no evidence (competent or otherwise) to support a finding of fact that the requirements of Rule 12-21.005, Florida Administrative Code ("F.A.C.") were not met. Petitioner did not inquire of the witness that made the jeopardy determination the extent of her reliance upon the factors found in Rule 12-21.005(2), F.A.C. Dishonored checks (some still unpaid two years later), history of non-payment and untimely payment, unclaimed certified mail, refusal to comply with statutory electronic filing and payment requirements, and failure to file a timely return for April 2017 substantiate the jeopardy finding based upon both delay and the dishonored check not only by clear and convincing evidence, but also beyond a reasonable doubt.

Exception Number Four

Petitioner's exception number four is denied, as there is competent, substantial evidence to support the ALJ's finding of fact in paragraph 18 that the state's money remains in jeopardy due to Petitioner's refusal to abide by statutory filing and payment requirements, and failure to

honor previously dishonored checks submitted to the Department. This finding (the second sentence in paragraph 18 of the Order) relates to the current status of the Petitioner's alleged attempts to satisfy her debt to the state and comply with the law based upon evidence adduced at the disputed fact hearing herein. The first sentence in paragraph 18 relates to the underlying jeopardy finding, and is also supported by competent, substantial evidence. [Transcript pages 18, 26, 28-29, 31-32, 34, 48-49]

Exception Number Five

Petitioner's exception number five is denied, as there is competent, substantial evidence to support the ALJ's finding of fact in paragraph 26 that "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 2017." This is the testimony provided by Ms. Bartlett shortly after having her credibility impeached [Transcript pages 79-80] regarding the timing of her knowledge regarding the electronic filing and payment requirement. [Transcript pages 80-81] Evidence established Petitioner's submission of worthless checks as early as the October 2014 collection period [Transcript page 28], and Ms. Bartlett testified she was unaware until May or June 2017 [Transcript pages 81-82, 84]. That is a period of over 30 months. As a practical matter, it is unlikely that Ms. Bartlett's neglect of her business and its statutory duty to refrain from conversion/theft of state funds for 7 months versus 11 months is even relevant.

Exception Number Six

Petitioner's exception number six is denied, as there is competent, substantial evidence to support the ALJ's finding of fact in paragraph 30. It is clear from the context of the first clause of the single sentence that constitutes paragraph 30 that the ALJ's finding therein relates to Petitioner's failure to make any effort to honor the March and April 2017 checks once Ms. Bartlett became aware of them. [Transcript pages 31-32, 48-49] Petitioner cites its Exhibit 4 (four letters from Petitioner to the Department) to support its position that Petitioner made efforts to pay its tax liability:

A) The letter dated August 4, 2017 was identified as a protest, and included no effort to pay or payment for prior dishonored checks. Ms. Bartlett claimed she was not notified;

B) The letter dated May 26, 2017 included no effort to pay or payment for prior dishonored checks. Ms. Bartlett requested information and "patience";

C) The letter dated May 22, 2017 was identified as a protest, discussed continuing to file and pay each month as well as making the monthly payment, but included no effort to pay or payment for prior dishonored checks; and

D) The letter dated May 1, 2017 was identified as a protest, included no effort to pay or payment for prior dishonored checks.

None of these letters indicate inclusion of a payment, and none of these letters document a payment made or effort to pay Petitioners liabilities.

Exception Number Seven

Petitioner's exception number seven to conclusion of law paragraph number 33 is denied, as a jeopardy finding and assessment is governed by s. 213.732, F.S., and taxpayer contest of an assessment provided for under Chapter 213 is authorized pursuant to section 72.011(1)(a), F.S. Even if Petitioner's position were valid and the language in s. 120.80(14)(b)2., F.S. were not applicable to this matter, the burden of proof that would be applicable is preponderance of the evidence as set forth in s. 120.57(1)(j), F.S. As ALJ Desai applied a clear and convincing evidence standard to the Department's burden of proof when sustaining the jeopardy finding and assessment, Petitioner's exception is without merit, as a matter of law. [Recommended Order paragraph 37]

Exception Number Eight

Petitioner's exception number eight to conclusion of law paragraph number 36 is denied, as an ALJ is authorized to consider ongoing statutory non-compliance, existing liabilities – a taxpayer's entire history – when determining whether the Department's jeopardy finding and assessment is justified. The Department's jeopardy notice (as indicated in Rule 12-21.005(2)(a), F.A.C.) identifies dishonored checks (for payment of tax money that never belonged to Petitioner), and the factual determination that delay will cause or create jeopardy as the basis for the jeopardy notice. While Petitioner is correct that the Department's jeopardy notice could have listed numerous other factual bases supporting the jeopardy finding (extensive history of dishonored checks, non-payment of taxes collected, unclaimed Department notices sent by

certified mail, refusal to comply with statutory electronic filing and payment requirements despite agreeing in writing to do so, and failure to file a timely return for April 2017), the factual bases listed on the notice are sufficient to sustain the jeopardy finding and assessment by clear and convincing evidence. [Recommended Order paragraph 37; Rule 12-21.005(2)(a), F.A.C.]

Exception Number Nine

Petitioner's exception number nine to conclusion of law paragraph number 37 is denied, as a jeopardy notice must allege sufficient facts to sustain the finding, not every possible fact that may support the finding, as argued by Petitioner. As Petitioner indicates, Rule 12-21.005(2)(a), F.A.C., provides that a taxpayer's prior history will be considered when a jeopardy finding is made. All of the facts Petitioner alleges should have been included in the jeopardy notice constitute Petitioner's prior history of non-compliance with statutory requirements for reporting and remitting any tax, and a taxpayer is placed on notice, by virtue of the aforementioned rule, that its history will be reviewed when a jeopardy determination is considered. [Recommended Order paragraph 37; Rule 12-21.005(2)(a), F.A.C.]

Petitioner has repeatedly made an issue regarding its alleged failure to receive Department notices. The Department refers Petitioner to review ***Shelley v. Department of Financial Services***, 846 So.2d 577 (Fla. 1st DCA 2003). In this case, the court found that unclaimed certified mail, combined with regular mail that was not returned undeliverable, met due process requirements for service of notice for purposes of initiating an administrative proceeding

FINDINGS OF FACT

The Department adopts and incorporates in this Final Order the Findings of Fact set forth in the Recommended Order as if fully set forth herein.

CONCLUSIONS OF LAW

The Department adopts and incorporates in this Final Order the Conclusions of Law set forth in the Recommended Order as if fully set forth herein.

Accordingly, it is ORDERED that the May 26, 2017 Notice of Jeopardy Finding and Notice of Final Assessment are hereby sustained, with statutory interest thereon continuing to accrue until the amount due is paid in full.

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**.

DONE AND ENTERED in Tallahassee, Leon County, Florida this 11th day of July, 2019.

STATE OF FLORIDA
DEPARTMENT OF REVENUE

Andrea Moreland

ANDREA MORELAND
DEPUTY EXECUTIVE DIRECTOR

CERTIFICATE OF FILING AND SERVICE

I HEREBY CERTIFY that the foregoing FINAL ORDER has been filed in the official records of the 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 Petitioner at POB 342681, Tampa, Florida 33694; and C/O William B. Meacham at 308 East Plymouth Street, Tampa, Florida 33603 this 11th day of July, 2019.

Megan Maxwell
Agency Clerk

Copies furnished to:

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