

STATE OF FLORIDA DEPARTMENT OF REVENUE
TALLAHASSEE, FLORIDA

SOUTHEAST PETRO DISTRIBUTORS, INC.,

Petitioner,

vs.

DEPARTMENT OF REVENUE,

Respondent.

DOR 2021-001-FOF

DOAH Case Number: 19-5900

BP Number: 88120

Audit (Refund) Number 5000155922

~~DOR 2021-001-FOE~~

FILED

Department of Revenue – Agency Clerk

Date Filed: **February 22, 2021**

By: **Megan Maxwell**

FINAL ORDER

This cause came before the State of Florida, Department of Revenue (“Department”) for the purpose of issuing a Final Order pursuant to Section 120.57, Florida Statutes (F.S.). 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 October 19, 2020 by Judge Lisa Shearer Nelson, is attached to this order and incorporated by reference as if fully set forth herein as Exhibit 1.

A copy of Petitioner’s Exceptions to the Recommended Order is attached to this order as Exhibit 2. Petitioner’s exceptions were timely filed. Respondent’s sole exception to the Recommended Order was also timely filed, and is attached to this order as Exhibit 3. Neither party filed a response to exceptions.

The Department has jurisdiction in this cause.

RULINGS ON EXCEPTIONS

The entire record in this matter has been reviewed in preparation of this Final Order. Pursuant to subsection 120.57(1)(k), 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.

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. Respondent's sole exception has not been properly identified as required by the aforementioned statute, and shall not be ruled upon. Petitioner's exceptions have been properly identified as required by the aforementioned statute, and shall 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. *Laney v. Board of Public Instruction*, 15 So.2d 748 (Fla.

1943); *Heifetz v. DBPR, Div. of ABT*, 475 So.2d 1277 (Fla. 1st DCA 1985); *J.S. v. Dept. of Children & Families*, 18 So.3d 1170 (Fla. 1st DCA 2009).

Pursuant to Subsection 120.57(1)(l), F.S., the Department is bound by the findings of fact in the Order unless, following a review of the entire record, the Department determines 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. In order to modify or reject a finding of fact, the Department must identify valid reasons for such modification or rejection and state those reasons with particularity. It is insufficient to merely conclude that a finding is not supported by competent, substantial evidence without explanation. *Prysi v. Department of Health*, 823 So.2d 823 (Fla. 1st DCA 2002). If the evidence adduced at the final DOAH hearing could support inconsistent findings of fact, it is the Administrative Law Judge that must determine which factual findings are best supported by competent, substantial evidence. An agency may not reconsider either the weight of the evidence, or the credibility of witnesses. *Walker v. Board of Professional Engineers*, 946 So.2d 604 (Fla. 1st DCA 2006).

Regarding conclusions of law, Subsection 120.57(1)(l), F.S., provides that the Department may reject or modify conclusions of law and interpretations of rules over which the Department has substantive jurisdiction on the condition that the Department determines, and states with particularity the reasons, that each substituted or revised conclusion of law is as or more reasonable than the conclusion of law that was modified or rejected. *Barfield v. Department of Health, Board of Dentistry*, 805 So.2d 1008 (Fla. 1st DCA 2001).

Exception Number One

Petitioner's first exception is denied, as there is competent, substantial evidence to support the ALJ's determinations in Finding of Fact number 64, and the proceedings upon which the findings were based did comply with the essential requirements of law.

Exception Number Two

Petitioner's second exception is denied, as there is competent, substantial evidence to support the ALJ's determinations in the second and fourth sentences in Finding of Fact number 65, and the proceedings upon which the findings were based did comply with the essential requirements of law.

Exception Number Three

Petitioner's third exception is denied, as the ALJ's conclusion of law is supported by a preponderance of the competent, substantial evidence adduced at hearing, and the Petitioner's proposed conclusion of law is not as or more reasonable than the conclusion drawn by the ALJ in the second sentence of Conclusion of Law number 75.

Exception Number Four

Petitioner's fourth exception is denied, as the ALJ's conclusion of law is supported by a preponderance of the competent, substantial evidence adduced at hearing, and the Petitioner's proposed conclusion of law is not as or more reasonable than the conclusions drawn by the ALJ in the third and fourth sentences of Conclusion of Law number 77.

Exception Number Five

Petitioner's fifth exception is denied, as the ALJ's conclusion of law is supported by a preponderance of the competent, substantial evidence adduced at hearing, and the Petitioner's proposed conclusion of law is not as or more reasonable than the conclusion drawn by the ALJ in Conclusion of Law number 79.

Exception Number Six

Petitioner's sixth exception is denied, as the ALJ's conclusion of law is supported by a preponderance of the competent, substantial evidence adduced at hearing, and the Petitioner's proposed conclusion of law is not as or more reasonable than the conclusions drawn by the ALJ in Conclusion of Law number 81.

Exception Number Seven

Petitioner's seventh exception is denied, as the ALJ's conclusion of law is supported by a preponderance of the competent, substantial evidence adduced at hearing, and the Petitioner's proposed conclusion of law is not as or more reasonable than the conclusion drawn by the ALJ in Conclusion of Law number 84.

Exception Number Eight

Petitioner's eighth exception is denied, as the ALJ's conclusion of law is supported by a preponderance of the competent, substantial evidence adduced at hearing, and the Petitioner's proposed conclusion of law is not as or more reasonable than the conclusion drawn by the ALJ in the first sentence of Conclusion of Law number 85. In addition, it is clear that the ALJ's determinations do not rely upon the provisions of Rule 12A-1.096(1)(d), Florida Administrative

Code, but rather, are based upon the "... dictionary definitions provided by Petitioner..." (Recommended Order, Conclusion of Law number 86).

Exception Number Nine

Petitioner's ninth exception is denied, as the ALJ's conclusion of law is supported by a preponderance of the competent, substantial evidence adduced at hearing, and the Petitioner's proposed conclusion of law is not as or more reasonable than the conclusions drawn by the ALJ in the second, fourth, sixth, and seventh sentences of Conclusion of Law number 86.

Exception Number Ten

Petitioner's tenth exception is denied, as the ALJ's Conclusion of Law number 87 is relevant to these proceedings, and retaining this finding is more reasonable than striking it.

Exception Number Eleven

Petitioner's eleventh exception is denied, as the ALJ's Conclusion of Law number 88 is relevant to these proceedings, the ALJ's conclusion is supported by a preponderance of the competent, substantial evidence adduced at hearing, and retaining this determination is more reasonable than striking it.

Exception Number Twelve

Petitioner's twelfth exception is denied, as the ALJ's conclusion of law is supported by a preponderance of the competent, substantial evidence adduced at hearing, and the Petitioner's proposed conclusion of law is not as or more reasonable than the conclusions drawn by the ALJ in Conclusion of Law number 89.

Exception Number Thirteen

Petitioner's exception number thirteen is denied, as the ALJ's conclusion of law is supported by a preponderance of the competent, substantial evidence adduced at hearing, and the Petitioner's proposed conclusion of law is not as or more reasonable than the conclusions drawn by the ALJ in the third and fourth sentences of Conclusion of Law number 90.

Exception Number Fourteen

Petitioner's exception to the Recommendation submitted in the Recommended Order is denied, as the recommendation is reasonable based upon the ALJ's legal conclusions, which are fully supported by the preponderance of the competent, substantial evidence adduced at hearing.

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 denial of Petitioner's refund application number 5000155922 is hereby sustained.

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 22nd day of

February, 2021.

STATE OF FLORIDA
DEPARTMENT OF REVENUE



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 C/O Moffa, Sutton & Donnini, P.A., 100 West Cypress Creek Road Suite 930, Ft. Lauderdale, Florida 33309 this 22ND day of FEBRUARY, 2021.

megan maxwell
Agency Clerk

Copies furnished to:

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