

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

B CENTURY 21, INC.,

Petitioner,

vs.

Case No. 20-5390

DEPARTMENT OF REVENUE,

Respondent.

RECOMMENDED ORDER

On July 20, 2021, Administrative Law Judge Robert J. Telfer III, of the Florida Division of Administrative Hearings (DOAH), conducted a final hearing pursuant to section 120.57(1), Florida Statutes (2019), via the Zoom platform.

APPEARANCES

For Petitioner: Robert Andrew Heekin, Esquire
 The Law Office of Rob Heekin, Jr., P.A.
 2223 Atlantic Boulevard
 Jacksonville, Florida 32207

For Respondent: Randi Ellen Dincher, Esquire
 Franklin David Sandra-Rivero, Esquire
 Office of the Attorney General
 Revenue Litigation Bureau
 Plaza Level 1, The Capitol
 Tallahassee, Florida 32399

STATEMENT OF THE ISSUE

Whether Respondent Department of Revenue's (Department) January 27, 2020, Notice of Proposed Assessment to Petitioner B Century 21, Inc. (B Century 21) is incorrect.

PRELIMINARY STATEMENT

In a letter dated August 20, 2019, the Department notified Baligh Altheeb, owner of B Century 21, that it had initiated a sales and use tax audit of B Century 21, pursuant to section 213.32, Florida Statutes (2019). Upon the completion of the sales and use tax audit, the Department, in a letter dated January 27, 2020, issued a Notice of Proposed Assessment to B Century 21, which assessed B Century 21 with additional sales tax, penalty, and interest owed in the sum of \$240,016.00.

On May 21, 2020, B Century 21, through its Qualified Representative Brett Isaac, timely submitted a Petition to the Department challenging the Notice of Proposed Assessment. On September 2, 2020, the Department issued an Order Dismissing Petition with Leave to Amend. Thereafter, on September 25, 2020, B Century 21, through Mr. Isaac, submitted an Amended Petition. On December 14, 2020, the Department referred the Amended Petition to DOAH.

The undersigned originally noticed this matter for final hearing on February 16, 2021. On January 21, 2021, the Department filed a Motion to Continue Final Hearing, which the undersigned granted. The undersigned thereafter noticed this matter for final hearing on April 20, 2021.

On March 9, 2021, the Department filed a Motion for Order Declaring Petitioner Admitted the Department's First Request for Admissions and for Other Relief. Receiving no response from B Century 21, the undersigned, on March 17, 2021, entered an Order Granting Motion Declaring Matters Admitted and Setting Discovery Deadline, which: (a) pursuant to Florida Rule of Civil Procedure 1.370(b), ruled that those matters contained within the Department's First Request for Admissions were deemed admitted and were, therefore, conclusively established; and (b) ordered B Century 21 to

fully respond to all outstanding discovery, which included the Department's First Set of Interrogatories and Request for Production of Documents, or to show cause in writing as to why it was unable to do so, on or before 5:00 p.m., on March 29, 2021. The Order Granting Motion Declaring Matters Admitted and Setting Discovery Deadline further warned that failure to fully respond to outstanding discovery or show cause in a timely manner may result in an order precluding B Century 21 from introducing such requested records at the final hearing.

On April 7, 2021, Mr. Heekin appeared in this matter as B Century 21's counsel of record. On April 13, 2021, B Century 21 filed an Unopposed Motion to Continue Final Hearing, which the undersigned granted. The undersigned thereafter noticed this matter for final hearing on July 20, 2021.

On June 9, 2021, the Department filed a Motion for Attorney's Fees Pursuant to Sections 57.105 and 120.595, Florida Statutes.

The undersigned conducted a final hearing on July 20, 2021. B Century 21 presented the testimony of Mr. Altheeb, and introduced no exhibits.¹ The Department presented the testimony of: Ron Collier, the desk audit manager with the Department; Beth Baker, a revenue program administrator over the lead development process with the Department; and Elena Pitre, a tax

¹ At the beginning of the final hearing, the undersigned questioned the parties concerning a relatively large number of documents B Century 21 provided to DOAH shortly before the final hearing, in light of B Century 21's failure to timely respond to discovery requests. During this discussion, the parties noted that B Century 21 provided approximately 127 pages of documents to the Department, which are contained in Exhibit R8, on June 28, 2021. The remaining documents, according to B Century 21, were provided to the Department electronically, through a shared folder, over several dates between late June and July 7, 2021. Counsel for the Department denied ever receiving these additional documents, or receiving any notification that B Century 21 had shared these documents electronically. Although the undersigned deferred ruling on the consideration of these additional documents at the beginning of the hearing, B Century 21 ultimately did not offer them into evidence.

auditor with the Department. The undersigned admitted into evidence Respondent's Exhibits R1 through R9.

At the conclusion of the final hearing, the parties jointly requested a 30-day time period after the filing of the transcript to submit their proposed recommended orders. The two-volume Transcript was filed with the Division on August 25, 2021. The Department timely filed a Proposed Recommended Order, which the undersigned has considered in the preparation of this Recommended Order. B Century 21 did not file a proposed recommended order, a response to the Department's Motion for Attorney's Fees Pursuant to Sections 57.105 and 120.595, Florida Statutes, or any post-hearing submittal.

All statutory references are to the 2019 codification of the Florida Statutes unless otherwise indicated.

FINDINGS OF FACT

Parties

1. The Department is the state agency responsible for administering Florida's sales and use tax laws, pursuant to chapter 212, Florida Statutes.

2. B Century 21 is a Florida S-Corporation that operates two liquor stores (Al's Liquor and Arlington Liquor), as well as a bar (Overtime Sports Bar), in Jacksonville, Florida.

3. Mr. Altheeb is the sole owner of B Century 21 and testified that he is solely responsible for the operation of it, including the two liquor stores and bar. With respect to the operation of B Century 21, Mr. Altheeb testified, "I do all the paperwork, all the books, all the taxes. I do all the orders."

Matters Deemed Admitted and Conclusively Established²

4. B Century 21 received correspondence from the Department, dated August 20, 2019. That correspondence, from Ms. Pitre, stated, in part, “I will be conducting an examination of your books and records as authorized under *Section 213.34, Florida Statutes.*”

5. B Century 21 received the Department’s form DR840, Notice of Intent to Audit Books and Records, dated August 20, 2019, including the Sales and Use Tax Information Checklist. The form DR-840 indicated that the Department intended to audit B Century 21 for a tax compliance audit for the period of July 1, 2016, through June 30, 2019. The Sales and Use Tax Information Checklist listed a number of categories of documents the Department intended to review as part of this audit.

6. B Century 21 (through its accountant, power of attorney, and qualified representative, Mr. Isaac) received the Department’s October 30, 2019, correspondence, which referenced the “Audit Scope and Audit Commencement,” and an attached Records Request list.

7. B Century 21 (through Mr. Isaac) received an email, dated October 30, 2019, from Ms. Pitre. That email references an attached Audit Commencement Letter.

8. B Century 21 (through Mr. Isaac) received an email, dated November 12, 2019, from Ms. Pitre, which inquired of “the status of the records requested during the meeting with you and Mr. Altheeb on October 29, 2019.”

9. B Century 21 (through Mr. Isaac) received the Department’s Notice of Intent to Make Audit Changes, form DR-1215, dated December 16, 2019. The form DR-1215 reflects a total amount of tax of \$170,232.93, a penalty of \$42,558.24, and interest through December 16, 2019, of \$25,461.86, for a total deficiency of \$238,253.04. The form DR-1215 also reflects that if B Century

² See Order Granting Motion Declaring Matters Admitted and Setting Discovery Deadline. Fla. R. Civ. P. 1.370(b).

21 did not agree with these audit changes, or only agreed with a portion, that it had until January 15, 2020, to request a conference or submit a written request for an extension. Further, the form DR-1215 attached a Notice of Taxpayer Rights, which included additional detail on the options available to B Century 21.

10. B Century 21 (through Mr. Isaac) received correspondence from Ms. Pitre, dated December 16, 2019, which stated that as of the date of the correspondence, the Department had not received the information previously requested on October 13, 2019, which it needed to complete the audit. The correspondence stated that B Century 21 had 30 days to review the audit changes, provided contact information to B Century 21 if it wished to discuss the findings in the form DR-1215, and noted that if the Department did not hear from B Century 21 within 30 days, it would send the audit file to the Department's headquarters in Tallahassee, Florida.

11. B Century 21 (through Mr. Isaac) received the Department's Notice of Proposed Assessment, form DR-831, dated January 27, 2020. The form DR-831 reflects a total amount of tax of \$170,232.93, a penalty of \$42,558.24, and interest through January 27, 2020, of \$27,224.82, for a total deficiency of \$240,016.00.

12. For the time period between August 20, 2019, and January 7, 2021, B Century 21 did not provide the Department with: (a) any sales records; (b) any purchase records; or (c) any federal tax returns.

13. For the time period between August 20, 2019, and January 7, 2021, B Century 21 did not provide any records to the Department for examination in conducting the audit.

Additional Facts

14. In 2011, for the purpose of enforcing the collection of sales tax on retail sales, the Florida Legislature enacted section 212.133, Florida Statutes, which requires every wholesale seller (wholesaler) of alcoholic beverage and

tobacco products (ABT) to annually file information reports of its product sales to any retailer in Florida. *See* § 212.133(1)(a) and (b), Fla. Stat.

15. Once a year, ABT wholesalers report to the State of Florida their name, beverage license or tobacco permit number, along with each Florida retailer with which they do business, the Florida retailer's name, retailer's beverage license or tobacco permit number, retailer's address, the general items sold, and sales per month. *See* § 212.133(3), Fla. Stat. The information collected captures the 12-month period between July 1 and June 30, and is due annually, on July 1, for the preceding 12-month period. *Id.*

16. ABT wholesalers file these reports electronically through the Department's efilings website and secure file transfer protocol established through the Department's efilings provider. § 212.133(2)(a), Fla. Stat.

17. Ms. Baker explained this statutory process further:

[W]e annually, every year in the month of May, my unit reaches out to the Florida Department of Business and Professional Regulations. We compel them to give us a list of all of the active wholesalers who were licensed to sell to retailers in the state of Florida for the prior fiscal year. Once we receive that list, we then mail a notification to all those wholesalers and state the statute and the requirements and give them a user name and a password that will allow them to then log into that portal and submit their retail—their wholesale—or their wholesale sales to retailers in the state of Florida for the prior fiscal year.

Those reports are due on July 1st of each year, but they are not considered late until September 30th of that year. So that gives the wholesaler population a couple of months to compile all of their sales for the prior year, fill out their reports and submit them to the Florida Department of Revenue by the end of September.

18. Additionally, each month, and for each retail location, B Century 21 reports gross monthly sales to the Department, and remits sales tax, utilizing the Department's form DR-15.

19. Ms. Baker further described the process the Department utilizes in identifying an "audit lead," utilizing the data that ABT wholesales provide:

Specifically for ABT, we have a very, actually, kind of simple comparison that we do. . . . [A]s a taxpayer, as a retailer in the state of Florida, you may purchase from multiple wholesalers.

So, part of our job is we compile all of the purchases that each beverage license or tobacco license has purchased, and once we compile all the purchases for the fiscal year, then to say, you know, what were the purchases for the fiscal year versus what were the reported sales for the fiscal year.

And, again, a pretty simple comparison we really look to see, did you purchase, or . . . did you report enough sales to cover the amount of purchases that we know you made as a – as a retailer. And if the sales amount does not exceed the purchase amount, then we'll create a lead on it.

20. The Department's e-filing provider exports the ABT wholesalers' information to SunVisn, the Department's database. The Department's analysts review the ABT wholesalers' reported data, and taxpayer information, to identify audit leads. The Department then assigns these audit leads to its service centers to conduct an audit.

21. A tax audit period is 36 months. In conducting ABT audits, the Department has 24 months of reported data (*i.e.*, the first 24 months of the audit period) for review. This is because the timing of section 212.133(3) requires ABT wholesalers to report annually on July 1, for the preceding 12-month period of July 1 through June 30.

22. For the ABT reporting data examination period of July 1, 2016, through June 30, 2018 (a period of 24 months), B Century 21's gross sales for its two liquor stores was as follows:

Liquor Store	Reported Gross Sales
Al's Liquor	\$1,051,128.56
Arlington Liquor	\$902,195.49

23. For the same 24-month time period of July 1, 2016, to June 30, 2018, B Century 21's wholesalers reported the following ABT inventory purchases to the State, as required under section 212.133:

Liquor Store	ABT Inventory Purchases
Al's Liquor	\$1,250,055.79
Arlington Liquor	\$1,174,877.98

24. As the ABT wholesalers' reported ABT inventory purchases by B Century 21's retail outlets were higher than B Century 21's reported sales, the Department issued an audit lead, which led to the audit that is at issue in this proceeding.

The Audit

25. For the 36-month audit period of July 1, 2016, through June 30, 2019 (audit period), B Century 21's reported gross sales for each of its locations was:

Location	Reported Gross Sales
Al's Liquor	\$1,557,569.74
Arlington Liquor	\$1,434,551.65
Overtime Sports Bar	\$968,476.08

26. On August 20, 2019, Ms. Pitre mailed to B Century 21 (and received by Mr. Altheeb), a Notice of Intent to Audit Books and Records for the audit period. Included with the Notice of Intent to Audit Books and Records was correspondence informing B Century 21 of the audit and requesting records.

27. On August 26, 2019, Ms. Pitre received a telephone call from Mr. Altheeb. Ms. Pitre's case activity notes for this call state:

Received a call from Baligh Altheeb and he said he will be hiring Brett Isaac as his POA [power of attorney]. I informed him to complete the POA form and to give it to Mr. Isaac for signature and send to me. He knows about ABT Data assessments and asked that I note on the case activity that he contacted me regarding the audit. He was worried that his liquor license will be suspended if he does not respond right away. I informed him that once I receive the POA, I will contact Mr. Isaac and discuss the audit.

28. On October 18, 2019, the Department received B Century 21's executed power of attorney (POA) form naming Mr. Isaac as its POA for the audit. The executed POA form reflects that the Department's notices and written communications should be sent solely to Mr. Isaac, and not B Century 21. The executed POA form further reflects that "[r]eceipt by either the representative or the taxpayer will be considered receipt by both."

29. On October 29, 2019, Ms. Pitre met with Mr. Altheeb and Mr. Isaac at Mr. Isaac's office, for a pre-audit interview. Ms. Pitre's case activity notes for this meeting state:

Met with the taxpayer contact person, POA Brett Isaac and owner Baligh Thaleeb [sic], at the POA's location to conduct the pre-audit interview. Discussed the scope of the audit, records needed to conduct the audit, availability of electronic records, business organization, nature of the business, internal controls, and the time line of the audit. Discussed sampling for purchases and POA signed

sampling agreement. Made appointment to review records on November 12, 2019.

Toured one of the location [sic] to observe business operations, Overtime Sports Bar.

30. On October 30, 2019, Ms. Pitre emailed Mr. Isaac a copy of the Notice of Intent to Audit Books and Records, which included a “Sales and Use Tax Information Checklist,” which requested specific taxpayer records.

31. After receiving no response from Mr. Isaac, Ms. Pitre, on November 12, 2019, emailed Mr. Isaac concerning “the status of the records requested during the meeting with you and Mr. Altheeb on October 29, 2019.”

32. Section 212.12(5)(b) provides that when a taxpayer fails to provide records “so that no audit or examination has been made of the books and records of” the taxpayer:

[I]t shall be the duty of the department to make an assessment from an estimate based upon the best information then available to it for the taxable period of retail sales of such dealer ... or of the sales or cost price of all services the sale or use of which is taxable under this chapter, together with interest, plus penalty, if such have accrued, as the case may be. Then the department shall proceed to collect such taxes, interest, and penalty on the basis of such assessment which shall be considered prima facie correct, and the burden to show the contrary shall rest upon the [taxpayer].

33. Section 212.12(6)(b) further provides:

[I]f a dealer does not have adequate records of his or her retail sales or purchases, the department may, upon the basis of a test or sampling of the dealer’s available records or other information relating to the sales or purchases made by such dealer for a representative period, determine the proportion that taxable retail sales bear to total

retail sales or the proportion that taxable purchases bear to total purchases.

34. Mr. Collier testified that, in the absence of adequate records, the Department “estimates using best available information, and for this industry ... ABT sales are a higher percentage of their taxable sales.”

35. Because B Century 21 did not provide adequate records to Ms. Pitre, she estimated the total taxable sales for the audit period. For each liquor store that B Century 21 operated, she multiplied its total ABT purchases by average markups to calculate total ABT sales. To derive these average markups, Mr. Collier explained that the Department receives data from wholesalers, and then:

[W]e take that purchase information, apply average markup to the different ABT product categories, which include cigarettes, other tobacco, beer, wine, and liquor; and then that gets us to total ABT sales number. And then we derive what we call a percentage of ABT sales, percentage of that number represents.

And in this particular model, 95.66 percent represents what we believe in a liquor store industry, that this type of business, that 95.66 percent of their sales are ABT products. We derive the markups, and the percentage of ABT sales from a number of liquor store audits that the Department had performed on liquor stores that provided records.

36. The Department utilized markup data from other ABT audits. The Department applied the following markups to these ABT categories: 6.5 percent for cigarettes; 47.5 percent for other tobacco products; 17.33 percent for beer; 29.84 percent for wine; and 24.5 percent for liquor.

37. Applying the Department’s markup for liquor stores to the wholesalers’ reported ABT data and percentage of taxable sales, Ms. Pitre

estimated taxable sales for the ABT reporting data examination period and calculated the under-reported sales error ratio as follows:

Location	Estimated Taxable Sales	Error Ratio
Al's Liquor	\$1,597,544.01	1.519837
Arlington Liquor	\$1,516,259.34	1.680633

38. The Department then divided B Century 21's estimated taxable sales for the examination period, for each liquor store, by its self-reported tax sales in its DR-15s to arrive at the under-reported rate. The Department then multiplied the under-reported rate by the reported taxable monthly sales in the DR-15s to arrive at the estimated taxable sales for the 36-month audit period. The result of this calculation was:

Location	Estimated Taxable Sales
Al's Liquor	\$2,367,252.11
Arlington Liquor	\$2,410,954.82

39. The Department then multiplied the estimated taxable sales by an effective estimated tax rate which, after giving credit for B Century 21's remitted sales tax, resulted in tax due for the Al's Liquor and Arlington Liquor for the audit period, as follows:

Location	Sales Tax Owed
Al's Liquor	\$58,367.01
Arlington Liquor	\$70,068.44

40. For Overtime Sports Bar, the Department could not use ABT wholesalers' data to estimate an assessment because the Department does

not have audit data averages for bars and lounges. The Department used the “Tax Due Method” in estimating under-reported taxes and calculating under-reported taxable sales. Mr. Collier explained:

The Department does not have average markup and percentage of sales for a bar. Though, you know, obviously, we all know that a bar, their main product that they sell and in most cases is ABT products.

So, therefore, typically, an auditor would need to get information about that specific location. Bars can vary so much in their type of business that they do, they can be like nightclubs, or they can be like bar and grill that serves a lot of food.

So there’s a lot of variances there for that particular type of industry, so we haven’t really come up with average markups, average percentage of sales for bars, per se. It’s a case-by-case situation, and in this case, the auditor decided that the fair, reasonable way to estimate the bar location would be to just average the error ratios that were derived from the Al’s Liquor and the other liquor store location and apply it to the taxable sales reported for the bar. And I think that’s a very fair and reasonable estimate based on what we all know in a bar situation; their markups are significantly higher.

And of course, there can be plenty of other non-ABT taxable sales occurring in a bar setting, such as prepared food, you know, just your regular cokes and drinks. So it’s certainly a fair way to estimate in this particular audit and I believe only benefits the taxpayer.

41. The undersigned credits the Department’s methodology for estimating an assessment for Overtime Sports Bar. Further, Mr. Altheeb testified that Overtime Sports Bar operates as both a sports bar and a liquor/package store, and stated:

Most of it—it's a liquor store. I don't know if you know the area, it's a liquor store on the Westside.

So most of it—the sport bar doesn't really do too much business in the Westside, mostly the liquor stores. People coming in and buy package, you know, buy bottles and leave. So, most of the business is the drive-through window.

The Department's decision to average the error ratios for the other two liquor stores to derive the additional tax due average for Overtime Sports Bar is reasonable, particularly in light of Mr. Altheeb's testimony that Overtime Sports Bar operates primarily as a liquor (package) store.

42. The Department calculated the additional tax due average error ratio for Overtime Sports Bar by averaging the error ratios of Al's Liquor and Arlington Liquor, and then multiplied it by B Century 21's reported gross sales to arrive at the additional tax due for Overtime Sports Bar of \$41,797.49.

43. Ms. Pitre testified that she determined that, for the audit period, B Century 21 owed additional sales tax of \$170,232.93. In addition, the Department imposed a penalty and accrued interest.

44. On December 16, 2019, Ms. Pitre sent correspondence, the preliminary assessment, and a copy of the audit work papers to B Century 21 (through Mr. Isaac), informing B Century 21 that it had 30 days to contact the Department's tax audit supervisor to request an audit conference or submit a written request for an extension. After receiving no response from B Century 21, Ms. Pitre forwarded the audit workpapers to the Department's headquarters in Tallahassee, Florida, to process the Notice of Proposed Assessment.

B Century 21's Position

45. As mentioned previously, and after initially meeting with the Department, B Century 21 failed to provide requested financial records or respond to any of the numerous letters and notices received from the

Department, despite being given adequate opportunity to do so. And, after filing its Amended Petition, it failed to timely respond to discovery requests from the Department which, *inter alia*, resulted in numerous matters being conclusively established.

46. Mr. Isaac served as the POA for B Century 21 during the audit, and also appeared in this proceeding as a qualified representative. However, Mr. Isaac did not appear at the final hearing, did not testify as a witness at the final hearing, and does not appear to have done anything for B Century 21 in this proceeding, other than filing the Petition and Amended Petition.

47. After Mr. Heekin appeared in this matter, and well after the time to respond to discovery, B Century 21 provided 127 pages of documents to the Department. These documents consist of: 18 pages of summaries of daily sales that Mr. Altheeb prepared for the hearing; 41 pages of sales and use tax returns from B Century 21 locations, covering 25 months (DR-15s); 2 pages of Harbortouch's 2016 1099K, reporting credit card sales; 43 pages of unsigned federal tax returns from 2016, 2017, and 2018, prepared by Mr. Isaac; and 17 pages of B Century 21's untimely responses to the Department's discovery requests.

48. Florida Administrative Code Rule 12-3.0012(3) defines "adequate records" to include:

(3) "Adequate records" means books, accounts, and other records sufficient to permit a reliable determination of a tax deficiency or overpayment. Incomplete records can be determined to be inadequate.

(a) To be sufficient to make a reliable determination, adequate records, including supporting documentation, must be:

1. Accurate, that is, the records must be free from material error;

2. Inclusive, that is, the records must capture transactions that are needed to determine a tax deficiency or overpayment;

3. Authentic, that is, the records must be worthy of acceptance as based on fact; and

4. Systematic, that is, the records must organize transactions in an orderly manner.

(b) The nature of the taxpayer's business, the nature of the industry, materiality, third-party confirmations and other corroborating evidence such as related supporting documentation, and the audit methods that are suitable for use in the audit, will be used to establish that the taxpayer has adequate records.

49. The undersigned finds that the summaries of daily sales are not adequate records because Mr. Altheeb prepared them for use at the final hearing, rather than in the regular course of business.

50. The undersigned finds that the DR-15s provided by Mr. Altheeb, covering 25 months, are not adequate records because they are incomplete and are not inclusive. The audit period encompassed 36 months, for B Century 21's three retail locations; however, Mr. Altheeb only provided 25 months of DR-15s.

51. The 2016, 2017, and 2018 federal tax returns that B Century 21 provided are not adequate records because they are not authentic. Mr. Altheeb was unable to verify if these tax returns were correct, and they were unsigned. B Century 21 did not provide any evidence that it had filed any of these federal tax returns with the Internal Revenue Service.

52. Ms. Pitre reviewed the 127 pages of documents that B Century 21 provided and testified that the summaries of daily sales did not provide the "source documents" for verification.

53. The unsigned federal tax returns reflect that B Century 21 reported a cost-of-goods-sold (COGS) of \$518,606.00 for 2016; \$1,246,839.00 for 2017;

and \$796,968.00 for 2018. Additionally, the unsigned federal tax returns reflect that B Century 21 reported a beginning inventory (BI) for 2016 of \$95,847.00, and a year-end inventory (EI) for 2016 of \$200,556.00, EI for 2017 of \$280,235.00, and EI for 2018 of \$295,628.00.

54. When comparing the unsigned federal tax returns with the ABT wholesalers' data, the federal tax returns reflect, for 2016, total inventory purchases of \$623,315.00 (which is derived from \$518,606.00 (COGS) + \$200,556.00 (EI) - \$95,847.00 (BI)). However, the ABT wholesalers' data for 2016 reflects that B Century 21's ABT purchases were \$1,174,997.34 – a discrepancy of more than \$500,000.00.

55. For 2017, the federal tax returns reflect total inventory purchases of \$1,326,518.00 (which is derived from \$1,246,839.00 (COGS) + \$280,235.00 (EI) for 2017 - \$200,556.00 (EI) for 2016). However, the ABT wholesalers' data for 2016 reflects that B Century 21's ABT purchases were \$1,422,854.79 – a discrepancy of over \$96,000.00.

56. And for 2018, the unsigned federal tax returns reflect total inventory purchases of \$812,361.00 (which is derived from \$796,968.00 (COGS) + \$295,628.00 (EI) for 2018 - \$280,235.00 (BI) for 2017). However, the ABT wholesalers' data for 2018 reflects that B Century 21's ABT purchases were \$1,335,814.00 – a discrepancy of over \$500,000.00.

57. Mr. Altheeb testified that Arlington Liquor and Overtime Sports Bar opened in 2016 – after B Century 21 began ownership and operation of Al's Liquor. He stated that he did not purchase inventory for the openings of the newer locations, but instead transferred excess inventory from Al's Liquor, which resulted in lower total inventory purchases for 2016.

58. Mr. Altheeb also testified that B Century 21's three locations experienced spoiled inventory. However, B Century 21 should include spoiled inventory in COGS reported in its federal tax returns, and further, B Century 21 provided no additional evidence of the cost of spoilage for the audit period.

59. The undersigned finds that the ABT wholesalers' data for 2016 through 2018 reflects similar amounts for inventory purchases between 2016 through 2018. The undersigned credits the Department's reliance on the ABT wholesalers' data, which reflect fairly consistent purchases for each year. The undersigned does not find the unsigned federal tax returns that B Century 21 provided to be persuasive evidence that the Department's assessment was incorrect.

60. Mr. Altheeb testified that he believed Mr. Isaac, who B Century 21 designated as POA for the audit, and who appears as a qualified representative in this proceeding, was actively handling the audit. Mr. Altheeb stated that the audit, and the final hearing, "kind of came out of nowhere" and that once he learned of it, he retained Mr. Heekin and provided "everything" to him.

61. However, it is conclusively established that the Department provided correspondence and notice to B Century 21 through its designated POA, and that B Century 21 failed to respond to record requests in a timely manner. Mr. Isaac neither testified nor appeared at the final hearing to corroborate Mr. Altheeb's claims that Mr. Isaac did not keep Mr. Altheeb or B Century 21 apprised of the status of the audit, including the failure to provide requested records or to communicate with the Department.

62. B Century 21 also attempted to challenge the Department's use of markup data from other ABT audits, in an attempt to argue that the markups were inflated and not representative of B Century 21's markups. However, and as previously found, B Century 21's failure to timely provide records—or respond in any meaningful way to the audit—undermines this attempt. The undersigned credits the Department's methodology in using the best information available to it for the audit period in calculating the assessment.

63. Although it became apparent during the final hearing that Mr. Altheeb did not treat the audit of B Century 21 with appropriate seriousness, and deflected blame to Mr. Isaac, and that his approach resulted in a legally appropriate and sustainable audit and assessment based on the Department's best information available, the undersigned does not find that B Century 21, Mr. Isaac, or Mr. Heekin knew that the allegations of the Amended Petition were not supported by the material facts necessary to establish the claim or defense, or would not be supported by the application of then-existing law to those material facts.

64. The undersigned finds that the Department made its assessment based on the best information then available, and is thus prima facie correct, pursuant to section 212.12(5)(b).

65. The undersigned further finds that B Century 21 did not prove, by a preponderance of the evidence, that the Department's assessment is incorrect, pursuant to section 212.12(5)(b).

CONCLUSIONS OF LAW

66. The Division has jurisdiction over the subject matter and the parties to this proceeding in accordance with sections 120.569, 120.57(1) and 120.80(14)(b).

67. Section 212.12(5)(b) provides that when a taxpayer fails to provide records "so that no audit or examination has been made of the books and records of" the taxpayer, the Department has a duty to make an assessment based on the best information then available to it. Section 212.12(5)(b) further provides that such an assessment "shall be considered prima facie correct, and the burden to show the contrary shall rest upon the [taxpayer]." *See also A&S Entertainment, LLC v. Dep't of Rev.*, 282 So. 3d 905, 909 (Fla. 3d DCA 2019).

68. As the Department's assessment in his matter is prima facie correct pursuant to section 212.12(5)(b), B Century 21 has the burden to prove, by a preponderance of the evidence, that the assessment is incorrect. *See* § 120.57(1)(j), Fla. Stat.; *A&S Entertainment*, 282 So. 3d at 909; *IPC Sports, Inc. v. Dep't of Revenue*, 829 So. 2d 330, 332 (Fla. 3d DCA 2002).

Preponderance of the evidence is described as “the greater weight of the evidence” and “evidence that more likely than not tends to prove a certain proposition.” *S. Fla. Water Mgmt. Dist. v. RLI Live Oak, LLC*, 139 So. 3d 869, 872 (Fla. 2014)(internal quotations omitted).

69. Section 212.05 states, in part:

It is hereby declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this state, including the business of making mail order sales, or who rents or furnishes things or services taxable under this chapter, or who stores for use or consumption in this state any item or article of tangible personal property as defined herein and who leases or rents such property within the state.

(1) For the exercise of such privilege, a tax is levied on each taxable transaction or incident, which tax is due and payable as follows:

(a)1.a. At the rate of 6 percent of the sales price of each item or article of tangible personal property when sold at retail in this state, computed on each taxable sale for the purpose of remitting the amount of tax due the state, and including each and every retail sale.

70. Section 212.02(15) defines “sale” to include “[a]ny transfer of title or possession, or both, exchange, barter, license, lease, or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration.”

71. Section 212.02(19) defines “tangible personal property,” as follows:

“Tangible personal property” means and includes personal property which may be seen, weighed, measured, or touched or is in any manner perceptible to the senses, including electric power or energy, boats, motor vehicles and mobile homes as defined in s. 320.01(1) and (2), aircraft as defined in s. 330.27, and all other types of vehicles. The term “tangible personal property” does not include stocks, bonds, notes, insurance, or other obligations or securities or pari-mutuel tickets sold or issued under the racing laws of the state.

72. Sales tax is imposed at the rate of six percent, plus the discretionary sales surtax, when applicable. Sales tax is levied when items are sold at retail and is computed on each taxable sale for the purpose of remitting the amount of tax due to the state. *See* §§ 212.05(1)(a)1.a. and 212.054, Fla. Stat. Collected taxes are due to the Department on the first day of the succeeding month and are delinquent on the 21st day of the succeeding month. *See* §§ 212.06(1)(a), 212.11(1)(b), and 212.13(1), Fla. Stat; Fla. Admin. Code R. 12A-1.056.

73. Section 212.12(2)(b) provides:

When any person required under this section to make a return or to pay a tax or fee imposed by this chapter fails to disclose the tax or fee on the return within the time required ... a specific penalty shall be added to the additional tax or fee owed in the amount of 10 percent of any such unpaid tax or fee not paid timely if the failure is for not more than 30 days, with an additional 10 percent of any such unpaid tax or fee for each additional 30 days, or fraction thereof, while the failure continues, not to exceed a total penalty of 50 percent, in the aggregate, of any unpaid tax or fee.

In this matter, the Department reduced the penalty to 25 percent of the tax assessed.

74. In addition to the penalty the Department shall add interest to the payment deficiencies. *See* § 212.12(5)(b) and 213.235, Fla. Stat.

75. Section 212.06(2)(c) defines “dealer” to include “every person ... who sells at retail or who offers for sale at retail, or who has in his or her possession for sale at retail; or for use, consumption, or distribution; or for storage to be used or consumed in this state, tangible personal property as defined herein, including a retailer who transacts a mail order sale.”

76. The Department is authorized to inspect the records and accounts of all dealers that are subject to Florida’s revenue laws imposed under chapter 212, and to request information to ascertain a dealer’s tax liability, if any. If an audit deficiency exists, the Department is authorized to make an assessment and collect it. §§ 20.21, 212.12(5)(a), 212.13, 213.05, and 213.34, Fla. Stat.

77. The Department is authorized to prescribe the records to be kept by all dealers that are subject to sales and use tax. Dealers are required to keep suitable books and records of all sales and other records needed to determine the amount of tax due. All such books and records must be open to examination at reasonable hours to the Department. § 212.12(6)(a), 212.13, and 213.35, Fla. Stat. “Only records, receipts, invoices, resale certificates, and related documentation which are available to the auditor when such audit begins shall be deemed acceptable for the purposes of conducting such audit.” § 212.13(5)(c), Fla. Stat.

78. Section 212.13(2) requires all “dealers” to maintain a “complete record of tangible personal property or services received, used, sold at retail, distributed or stored, leased or rented by said dealer, together with invoices, bills of lading, gross receipts from such sales and other pertinent records and papers as may be required by the department for the reasonable administration of this chapter”

79. Rule 12-3.0012(3) defines “adequate records” to include books, accounts, and other records “sufficient to permit a reliable determination of a

tax deficiency or overpayment.” Rule 12-3.0012(3) further provides that adequate records must be accurate, authentic, and systematic, and must include reliable supporting documentation.

80. For the audit period, B Century 21 was a “dealer,” and was therefore required to collect and remit sales tax to the state. As a “dealer,” B Century 21 was required to maintain suitable books and records of its sales.

81. Based on the competent, substantial evidence adduced at the final hearing, B Century 21 failed to timely provide the Department’s auditor with any records, and shortly before the final hearing, produced some documents that were not “adequate records.”

82. B Century 21 received numerous communications, including correspondence and notices, from the Department about the audit. Mr. Altheeb and Mr. Isaac met with Ms. Pitre after receiving the August 20, 2019, Notice of Intent to Audit Books and Records. B Century 21 executed a POA form naming Mr. Isaac as its POA and instructing the Department to send all further notices and written communications solely to Mr. Isaac, and not B Century 21. The executed POA form further reflects that “[r]eceipt by either the representative or the taxpayer will be considered receipt by both.” “Generally, powers of attorney are strictly construed and will be closely examined in order to ascertain the intent of the principal.” *DeBueno v. Castro*, 543 So. 2d 393, 394 (Fla. 4th DCA 1989). The executed POA form clearly appointed Mr. Isaac and clearly directed the Department to provide all communications to Mr. Isaac. Based on the competent, substantial evidence adduced at the final hearing, the Department complied with the executed POA form, and Mr. Altheeb’s contention that B Century 21 was not aware of the audit was not credible.

83. The Legislature enacted section 212.133 “for the sole purpose of enforcing the collection of the tax levied by this chapter” on retail ABT sales. *See* § 212.133(1)(a), Fla. Stat. As B Century 21 failed to provide the Department with any records, the Department estimated the assessment on

the best information available to it – which was B Century 21’s ABT wholesaler reported data of reported purchases, together with the Department’s historical data of average markup rates and percentage of taxable sales from the audits of similar Florida dealers. The undersigned concludes, consistent with section 212.12(5)(b), that the assessment was prima facie correct.

84. Based on the competent, substantial evidence adduced at the final hearing, B Century 21 failed to show, by a preponderance of the evidence, that the Department’s assessment was incorrect.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby RECOMMENDS that the Department enter a final order sustaining the January 27, 2020, Notice of Proposed Assessment to B Century 21, Inc.

DONE AND ENTERED this 21st day of October, 2021, in Tallahassee, Leon County, Florida.



ROBERT J. TELFER III
Administrative Law Judge
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Filed with the Clerk of the
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this 21st day of October, 2021.

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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.