STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BELL INDUSTRIES, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 12-2013
	)	
DEPARTMENT OF REVENUE,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A formal hearing was conducted in this case on July 23, 2012, in Tallahassee, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Mark A. Begle, Qualified Representative
Bell Techlogix, Inc.[1/]
8888 Keystone Crossing, Suite 1700
Indianapolis, Indiana 46240

For Respondent: John Mika, Esquire
Office of the Attorney General
The Capitol, Plaza Level 01
Revenue Litigation Section
Tallahassee, Florida 32399-1050

STATEMENT OF THE ISSUE

The issue is whether the Department of Revenue (the "Department") may levy on deposits of Bell Industries, Inc.

("Bell Industries") held at Wells Fargo Bank as proposed in the Department's March 5, 2012, Notice of Intent to Levy.

PRELIMINARY STATEMENT

In a Notice of Intent to Levy dated March 5, 2012, the Department advised Bell Industries that it intended to levy upon property belonging to Bell Industries, namely $23,800.41 in the company's bank account at Wells Fargo Bank, for nonpayment of taxes, penalty and interest. On March 26, 2012, Bell Industries filed a letter contesting the Notice of Intent to Levy.

On June 8, 2012, the Department referred the case to the Division of Administrative Hearings for the assignment of an Administrative Law Judge and the conduct of a formal administrative hearing. The case was set for hearing on July 23, 2012. On June 22, 2012, an order was entered granting Bell Industries' motion that its representative, Mark A. Begle, be allowed to appear via teleconference. The hearing was convened and completed as scheduled.

At the hearing, the Department presented the testimony of Lucinda Kasten, a Revenue Specialist III. The Department's Exhibits 1 through 13 were admitted into evidence. Bell Industries presented the testimony of Mr. Begle and offered no exhibits into evidence.

The one-volume transcript of the hearing was filed at the Division of Administrative Hearings on August 3, 2012. The

Department timely filed a Proposed Recommended Order on August 13, 2012. Bell Industries did not file a proposed recommended order.

Unless otherwise noted, all statutory references are to Florida Statutes (2011).

FINDINGS OF FACT

1. The Department is the agency of the state of Florida charged with the duty to enforce the collection of taxes imposed pursuant to chapter 212, Florida Statutes, including the authority to levy against the credits or personal property of delinquent taxpayers. § 213.67, Fla. Stat.

2. Bell Industries is a holding company for the operation of several operating entities. In early 2007, Bell Industries purchased Skytel, a telecommunications services company, from Verizon. The purchased entity was subject the communications services tax set forth in chapter 202, Florida Statutes.

3. Mark A. Begle, an officer of Bell Industries, testified that the tax compliance issues undertaken by his company in this purchase were "quite painful and took a lot of time." Mr. Begle stated that the complexity of filings under the Florida communications services tax necessitated the hiring of Tax Partners, an outside specialty company based in Atlanta, to fulfill the Skytel tax obligations. It took Tax Partners

several months to get the systems in place to properly file the Florida tax forms.

4. Mr. Begle acknowledged that his company's initial Florida tax returns were late filed.

5. After the Department received and processed the initial returns, it sent initial notices to Bell Industries advising the company of the late filing penalty and interest amounts due for the delinquent months. The Department sent the initial notices on August 23, 2007.

6. Eventually, the Department sent out a Notice of Final Assessment to Bell Industries for each of the two tax periods for which the company had filed delinquent returns. The Notice of Final Assessment for the reporting periods of February 2007 through May 2007, was mailed on September 25, 2007. The Notice of Final Assessment for the reporting period of May 2008, was mailed on February 6, 2009.

7. The Department's Notice of Final Assessment offers a taxpayer two routes for contesting an assessment. First, the taxpayer may commence an informal protest process by submitting a letter requesting review to the Department within 20 days of the date of the assessment. § 213.21, Fla. Stat. and Fla. Admin. Code R. 12-6.0033. Second, the taxpayer may choose to bypass the informal protest process and commence the formal

appeals process provided by chapter 72, Florida Statutes, within 60 days of the date of the assessment.

8. Bell Industries did not timely invoke either method of contesting the assessments. Therefore, the assessments became final.

9. The Department filed a warrant, dated September 2, 2008, in Leon County stating that Bell Industries was indebted to the Department in the amount of $23,800.41.[2/] Of this amount, $23,780.41 was listed as "penalty." The remaining $20.00 was listed as a "filing fee." Thus, for all practical purposes, the claimed amount of indebtedness is entirely a penalty.

10. Department records indicated that the Department twice rejected Bell Industries' requests for compromise or waiver of the assessments, on September 14, 2007, and December 19, 2008.

11. The Department issued a Notice of Freeze, dated March 5, 2012, to Wells Fargo Bank, a financial institution in Philadelphia, Pennsylvania. The Notice of Freeze instructed the bank that Bell Industries had a delinquent liability for tax, penalty and interest owed to the Department pursuant to section 213.67, and that the bank "may not transfer, dispose of, or return any credits, debts, or other personal property owned/controlled by, or owed to, this taxpayer which are in your possession or control or become under your possession or control up to the amount of $23,800.41."

12. On March 15, 2012, Wells Fargo Bank reported to the Department that it was holding $23,800.41 in Bell Industries deposits.

13. On March 5, 2012, the Department issued a Notice of Intent to Levy on credits or personal property belonging to Bell Industries.

14. On March 21, 2012, the Department issued a Notice of Contested Intent to Levy, in acknowledgement that Bell Industries was contesting the Department's intended levy.

15. At the hearing, Bell Industries essentially conceded its liability for the amount owed. Mr. Begle, Bell Industries' representative, credibly testified that the company endeavors to be timely and in full compliance as regards all of its tax obligations.

16. Mr. Begle noted that his company sold Skytel in March 2008, which led to the termination of the relationship with Tax Partners and the dismantling of the entire management structure related to Skytel. Mr. Begle blamed these activities for Bell Industries' slow response, because correspondence from the Department regarding these tax issues was being sent to personnel no longer associated with Bell Industries. Mr. Begle requested that these unusual circumstances be taken into account and that the Department consider waiving or negotiating the penalty at issue in this proceeding.

17. At the hearing, the Department took the position that section 213.21 allows the Department to negotiate a compromise of an assessment of tax, interest and penalty, but that once the time for filing a challenge to the assessment passes, as set forth in Florida Administrative Code Rule 12-6.0033, the Department no longer has the authority to compromise a claim. Because Bell Industries failed to file a timely challenge, the Department could not accept less than the amount claimed in the Notice of Intent to Levy.

CONCLUSIONS OF LAW

18. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569, 120.57(1), and 213.67(7), Fla. Stat.

19. The general rule is that the burden of proof, apart from a statutory directive, is on the party asserting the affirmative of an issue before an administrative tribunal. Young v. Dep't of Cmty. Aff., 625 So. 2d 831, 833-834 (Fla. 1993); Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981); Balino v. Dep't of HRS, 348 So. 2d 349, 350 (Fla. 1st DCA 1977). In this case, the Department bears the burden of showing its entitlement to levy on the assets of Bell Industries by a preponderance of the evidence.

20. Section 95.091(1)(b), Florida Statutes, provides that a tax lien for any tax enumerated in section 72.011 is

enforceable for 20 years after the last date the tax may be assessed, after the tax becomes delinquent, or after the filing of a tax warrant, whichever is later. Chapter 202, Florida Statutes, the communications services tax, is one of the taxes enumerated in section 72.011. Section 202.35(2) provides that penalties imposed by chapter 202 are payable to and collectible by the Department in the same manner as if they were part of the tax collected under chapter 202.

21. Section 213.67 provides for the administrative garnishment of the assets of any taxpayer who owes delinquent taxes, penalties and interest. Florida Administrative Code Rules 12-21.201 through 12-21.205 implement section 213.67 by setting out the detailed procedure for administrative garnishment of the assets of the delinquent taxpayer. The facts found above establish that the Department complied with the terms of its implementing rules in providing notice to the taxpayer of its intended actions.

22. Florida Administrative Code Rule 12-21.202(5) defines "noncompliant taxpayer" to mean "any taxpayer against whom a warrant has been issued by the Department for nonpayment of an amount due pursuant to any revenue law enumerated in s. 213.05." Chapter 202 is enumerated in section 213.05. The facts found above establish that Bell Industries was a noncompliant taxpayer.

23. On March 5, 2012, the Department issued a Notice of Freeze to Wells Fargo Bank in accordance with rule 12-21.203.

24. Also on March 5, 2012, the Department issued a Notice of Intent to Levy on credits or personal property belonging to Bell Industries in accordance with rule 12-21.204.

25. The Department has made a prima facie showing of its entitlement to levy on the assets of Bell Industries.

26. Bell Industries did not contest the Department's entitlement to the levy, but sought to negotiate a compromise of the amount of the penalty.

27. Section 213.21 allows for the compromise of an assessed penalty during informal conferences. Rule 12-13.007 provides grounds for reasonable cause for compromise of penalties.[3/] However, the Department contends that rule 12-6.0033(1) prohibits the taxpayer from taking advantage of this provision for failure to make a timely challenge of the assessment.

28. Section 213.21(2) & (3)(a) provide:

> (2)(a) The executive director of the department or his or her designee is authorized to enter into closing agreements with any taxpayer settling or compromising the taxpayer's liability for any tax, interest, or penalty assessed under any of the chapters specified in s. 72.011(1). Such agreements shall be in writing when the amount of tax, penalty, or interest compromised exceeds $30,000 or for lesser amounts when the department deems it

appropriate or when requested by the taxpayer. When a written closing agreement has been approved by the department and signed by the executive director or his or her designee and the taxpayer, it shall be final and conclusive; and, except upon a showing of fraud or misrepresentation of material fact or except as to adjustments pursuant to ss.198.16 and 220.23, no additional assessment may be made by the department against the taxpayer for the tax, interest, or penalty specified in the closing agreement for the time period specified in the closing agreement, and the taxpayer shall not be entitled to institute any judicial or administrative proceeding to recover any tax, interest, or penalty paid pursuant to the closing agreement. The department is authorized to delegate to the executive director the authority to approve any such closing agreement resulting in a tax reduction of $250,000 or less.

(b) Notwithstanding the provisions of paragraph (a), for the purpose of facilitating the settlement and distribution of an estate held by a personal representative, the executive director of the department may, on behalf of the state, agree upon the amount of taxes at any time due or to become due from such personal representative under the provisions of chapter 198; and payment in accordance with such agreement shall be full satisfaction of the taxes to which the agreement relates.

(c) Notwithstanding paragraph (a), for the purpose of compromising the liability of any taxpayer for tax or interest on the grounds of doubt as to liability based on the taxpayer's reasonable reliance on a written determination issued by the department as described in paragraph (3)(b), the department may compromise the amount of such tax or interest liability resulting from such reasonable reliance.

(3)(a) A taxpayer's liability for any tax or interest specified in s. 72.011(1) may be compromised by the department upon the grounds of doubt as to liability for or collectability of such tax or interest. A taxpayer's liability for interest under any of the chapters specified in s. 72.011(1) shall be settled or compromised in whole or in part whenever or to the extent that the department determines that the delay in the determination of the amount due is attributable to the action or inaction of the department. A taxpayer's liability for penalties under any of the chapters specified in s. 72.011(1) may be settled or compromised if it is determined by the department that the noncompliance is due to reasonable cause and not to willful negligence, willful neglect, or fraud. The facts and circumstances are subject to de novo review to determine the existence of reasonable cause in any administrative proceeding or judicial action challenging an assessment of penalty under any of the chapters specified in s. 72.011(1). A taxpayer who establishes reasonable reliance on the written advice issued by the department to the taxpayer will be deemed to have shown reasonable cause for the noncompliance. In addition, a taxpayer's liability for penalties under any of the chapters specified in s. 72.011(1) in excess of 25 percent of the tax shall be settled or compromised if the department determines that the noncompliance is due to reasonable cause and not to willful negligence, willful neglect, or fraud. The department shall maintain records of all compromises, and the records shall state the basis for the compromise. The records of compromise under this paragraph shall not be subject to disclosure pursuant to s. 119.07(1) and shall be considered confidential information governed by the provisions of s. 213.053. (Emphasis added).

29. Florida Administrative Code Chapter 12-13, titled "Compromise and Settlement," implements section 213.21. The rules in this chapter are to be "used by the Executive Director or the Executive Director's designee... in the exercise of the authority to settle and compromise liability for tax, interest, and penalty granted by section 213.21, F.S." Fla. Admin. Code R. 12-13.001. Rule 12-13.003 sets forth the procedure for requesting a compromise:

> (1) Subsections 213.21(2)(a) and (3), F.S., authorize the Executive Director, or the Executive Director's designee, to enter into closing agreements settling or compromising a liability for tax, interest, or penalty under any of the chapters specified in section 72.011(1), F.S.
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> (2)(a) No tax, interest, penalty, or service fee shall be compromised or settled unless the taxpayer first submits a request to compromise or settle tax, interest, penalty, or service fees. Such request must be in writing if:
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> 1. The amount requested to be compromised is greater than $30,000; or
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> 2. The taxpayer asks to submit the request in writing; or
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> 3. The complexity of the issue(s) involved requires that the taxpayer submit a written request that explains the issue(s).
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> (b) The Department will accept a taxpayer's oral or electronic request for compromise or settlement, if:
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> 1. The request for a compromise is for an amount less than or equal to $30,000; and

2. The request is not subject to either of the criteria discussed in subparagraph 2. or 3. of paragraph (a) of this subsection.

(c) The taxpayer must establish in his or her request:

1. In regard to tax or interest, doubt as to the taxpayer's liability for tax or interest, or actual lack of collectability of the tax or interest as demonstrated to the satisfaction of the Department by audited financial statements or other suitable evidence acceptable to the Department. Grounds for finding doubt as to liability and doubt as to collectability, respectively, are set forth in further detail in rules 12-13.005 and 12-13.006, F.A.C.

2. In regard to penalty, that the noncompliance was due to reasonable cause and not to willful negligence, willful neglect, or fraud. The taxpayer shall be required to set forth the facts and circumstances which support the taxpayer's basis for compromise and which demonstrate the existence of reasonable cause for compromise of the penalty or service fee and such other information as may be required by the Department.

3. In regard to the service fee, when a financial institution error results in a draft, order, or check being returned to the Department, the taxpayer will be required to submit to the Department a written statement from the financial institution. The written statement must give the detail of the error(s) and explain why the financial institution was at fault. The statement must be on the financial institution's letterhead.

4. Grounds for finding reasonable cause are set forth in further detail in Rule 12-13.007, F.A.C.

30. Rule 12-6.0033 provides:

> (1)(a) A taxpayer may secure review of an assessment issued by the Department regarding tax returns, other required filings, and billings by implementing the provisions of this section. When a taxpayer has pursued review under the provisions of either Rule 12-6.002 or 12-6.003, F.A.C., or both, or has failed to comply with the time limitations or has exhausted the review rights in those rules, the taxpayer shall not have the right to pursue review under this section. The assessment procedure under this rule and review of such assessments regarding tax returns, other required filings, and departmental billings shall not preclude an audit of taxpayer books and records, and shall not preclude audit assessments or other assessments for tax deficiency.
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> (b) To secure review of an assessment regarding tax returns, other required filings, and billings a taxpayer must file a written protest postmarked or faxed within 20 consecutive calendar days (150 consecutive calendar days if the assessment is addressed to a person outside the United States) from the date of issuance on the assessment.
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> (c) Protests postmarked or faxed more than 20 consecutive calendar days (150 consecutive calendar days if the assessment is addressed to a person outside the United States) after the date of issuance on the assessment will be deemed late filed, and the assessment becomes final for purposes of Chapter 72, F.S., upon the expiration of 20 consecutive calendar days (150 consecutive calendar days if the assessment is addressed to a person outside the United States) after the date of issuance on the assessment, unless the taxpayer has timely secured a written extension of time within which to file a protest.

(d)1. A taxpayer may request an extension of time for filing a protest by mailing or faxing a written request to the address or fax number designated on the assessment. In order for the taxpayer's request to be considered timely, the request must be postmarked or faxed within 20 consecutive calendar days (150 consecutive calendar days if the assessment is addressed to a person outside the United States) from the date of issuance on the assessment. Each extension of time will be for 15 consecutive calendar days. Within a 15 consecutive calendar day extension period, the taxpayer may submit a request in writing to the address or fax number designated on the assessment for an additional 15 consecutive calendar day extension within which to submit a written protest.

2. Failure to mail or fax the written protest or failure to mail or fax a written request for an additional extension within a 20 consecutive calendar day extension period shall result in forfeiture of the taxpayer's rights to the proceedings provided by this rule and the proposed assessment will become a final assessment for purposes of Chapter 72, F.S., at the expiration of the extended filing period.

(2)(a) The protest shall be filed by mailing or faxing a written request to the address or fax number designated on the assessment, and shall include:

1. The taxpayer's name, address, telephone number, federal taxpayer identifying number, and account number or audit number (where appropriate);

2. The tax type, the periods, and dollar amount of tax, interest, or penalty protested;

3. A list of the unagreed items;

4. A statement of facts and a description of any additional information not previously available that supports the list of unagreed items;

5. A statement explaining the law or other authority on which the taxpayer's position is based;

6. A copy of the assessment;

7. A statement whether oral presentation and argument are requested.

(b)1. If the protest does not contain this required information, the taxpayer will be notified in writing by the office issuing the assessment that the required information must be submitted within 15 consecutive calendar days. Within this 15 consecutive calendar day period, the taxpayer may submit a request in writing to the office issuing the assessment for an additional 15 consecutive calendar days within which to submit this required information. Within a 15 consecutive calendar day extension period, the taxpayer may submit a request in writing to the office issuing the assessment for an additional 15 consecutive calendar day extension within which to submit this required information.

2. Failure to submit this information or to request an additional 15 consecutive calendar day extension within either the original 15 consecutive calendar day period or an additional 15 consecutive calendar day extension period shall result in issuance of a written dismissal of the protest and forfeiture of the taxpayer's right to the proceedings provided by this rule.

3. If the taxpayer either fails to submit the required information or fails to request an extension of time within which to submit the required information, the assessment

shall become a final assessment for purposes of Chapter 72, F.S., on the later of:

a. The date a 15-consecutive calendar day period expires pursuant to this rule; or

b. The expiration of 20 consecutive calendar days after the date of issuance on the assessment.

(3)(a)1. Upon receipt of a complete, timely filed written protest, the office that issued the assessment will review the protest and initiate an attempt to resolve the issues. The office that issued the assessment may require the office originating the assessment to provide a written explanation, report, or narrative setting forth the basis for the assessment. A copy of any explanation, report, or narrative provided by the originating office pursuant to this sub-paragraph shall be given to the taxpayer, if such document is disclosable pursuant to applicable law.

2. If a resolution is not achieved, the protest will be forwarded to Technical Assistance and Dispute Resolution. Technical Assistance and Dispute Resolution will review the protest and may require the office originating the assessment to provide a written explanation, report, or narrative setting forth the basis for the assessment. A copy of any explanation, report, or narrative provided by the originating office pursuant to this sub-paragraph shall be given to the taxpayer, if such document is disclosable pursuant to applicable law. If requested by the taxpayer, an opportunity for submission of additional information and an oral conference will be provided. Conferences are conducted informally in Tallahassee, Florida, and no transcript of the proceedings will be made by the Department.

> (b) If a protest is timely filed and the taxpayer and the Department are unable to resolve the disputed issues, a Notice of Reconsideration (NOR) shall be issued. The assessment will become a final assessment for purposes of Chapter 72, F.S., as of the date of issuance on the NOR.
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> (4) If at any time jeopardy conditions exist, the Department may initiate enforcement action under the Department's jeopardy procedures to enforce an assessment.
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> (5) Procedures outlined in this section shall be for investigative purposes as specified in Section 120.57(5), F.S. (Emphasis added).

31. Rule 12-6.0033 is titled "Protest of Assessments Issued by the Department Regarding Tax Returns, Other Required Filings, and Billings." While it is replete with statements of limitation such as the underscored provision above, the rule appears to be self-contained. Failure to timely file a protest constitutes a forfeiture of the right to "pursue review under this section." The rule does not appear to reach beyond chapter 12-6 to limit the authority of the Department's Executive Director to entertain an offer of compromise pursuant to section 213.21(2)&(3) and chapter 12-13. It makes conceptual sense that the Executive Director's discretionary ability to compromise a penalty in accordance with the criteria set forth in rule 12-13.007 would stand apart from the more workaday informal protest and appeal procedure outlined in chapter 12-6.

32. It is concluded that the Department erred in failing to at least consider Bell Industries' request for compromise of the amount owed. Bell Industries should be given an opportunity to submit a request for settlement or compromise pursuant to rules 12-13.003 and 12-13.007. This recommendation does not purport to make any statement as to the merits of the Bell Industries request.

33. In summary, the evidence in this case established that the Department is entitled to levy upon the assets of Bell Industries in the amount of $23,800.41. However, the evidence also established that the Department should have considered Bell Industries' request to settle or compromise the penalty assessment.

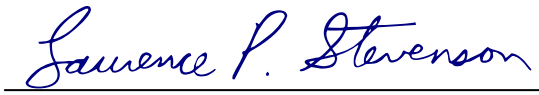
RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department of Revenue enter a final order finding that the $23,800.41 in the Wells Fargo Bank belonging to Bell Industries is subject to the Notice of Intent to Levy that the Department of Revenue issued on March 5, 2012, in accordance with section 213.67, Florida Statutes, but that the levy should not occur until Bell Industries is provided a reasonable period of time in which to submit a request for

settlement or compromise pursuant to Florida Administrative Code Rule 12-13.003.

DONE AND ENTERED this 27th day of August, 2012, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of August, 2012.

ENDNOTES

[1/] A power of attorney was filed giving Mr. Begle authority to represent Bell Industries, Inc., in this matter. At the hearing, Mr. Begle explained that Bell Industries, Inc., is a holding company for several entities, including Mr. Begle's employer, Bell Techlogix, Inc. Mr. Begle is the controller for Bell Techlogix, Inc., and is a corporate officer of Bell Industries, Inc., which has no controller or chief financial officer of its own. The Department of Revenue had no objection to Mr. Begle's acting as the qualified representative for Bell Industries, Inc.

[2/] Based on its date, the warrant could only have sought to recover the amount owed for the February through May 2007 tax period. However, the amount stated in this warrant is the same amount listed in the Department's March 5, 2012, Notice of Intent to Levy that is the subject of this hearing. Documents presented at the hearing show that the Department issued a Notice of Freeze to Wells Fargo Bank on October 13, 2011, in the amount of $26,178.45. Nonetheless, in this proceeding the

Department will be limited to the amount claimed in the Notice of Intent to Levy.

[3/] Rule 12-13.007 provides:

> (1)(a) The Executive Director or the Executive Director's designee, as enumerated in Rule 12-13.004, F.A.C., will make a determination of whether the taxpayer's noncompliance was due to reasonable cause and not to willful negligence, willful neglect, or fraud based on the facts and circumstances of the specific case. The standard used in this determination shall be whether the taxpayer exercised ordinary care and prudence and was nevertheless unable to comply.
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> (b) The exercise of ordinary care and prudence may be demonstrated by facts and circumstances as stated in writing by the taxpayer. Additionally, in those cases when a Department employee has information or knowledge supporting the taxpayer's assertion of ordinary care and prudence, a finding of reasonable cause may be based upon such additional information or knowledge, provided the finding of reasonable cause is documented to reflect such information or knowledge.
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> (c) When evaluating the facts and circumstances relevant to penalties assessed as a result of an audit, the Department shall consider information provided by the taxpayer in relation to the following:
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> 1. Whether the taxpayer has been audited previously, and, if so, whether the penalties which are the subject of the compromise request result from taxpayer actions that resulted in a specific issue-related deficiency assessment during one or more of the previous audits. It is not the intent of this subparagraph to apply to infrequent occurrences of human error;

2. The materiality of the tax deficiency assessed in an audit when considered within the context of taxes correctly reported and timely remitted by the taxpayer for the same tax during the same audit period;

3. Whether the taxpayer has initiated controls or other actions that will promote proper future reporting with respect to those activities which contributed to the audit deficiency and related penalties; and

4. Whether the tax was collected and not remitted to the state by the taxpayer.

(d) When evaluating the facts and circumstances relevant to penalties imposed pursuant to a billing not resulting from an audit, the Department shall consider:

1. The timeliness of payments made by the taxpayer during previous reporting periods;

2. The materiality of the tax deficiency to which the penalty relates within the context of the amount of the same taxes correctly reported and remitted;

3. Whether the taxpayer has initiated controls or other actions related to the errors that resulted in the billing and related penalties in order to promote better compliance in the future; and

4. Whether the tax was collected and not remitted to the state by the taxpayer.

(2) Reasonable cause is indicated by the existence of facts and circumstances which support the exercise of ordinary care and prudence on the part of the taxpayer in complying with the revenue laws of this state. Depending upon the circumstances, reasonable cause may exist even though the circumstances indicate that slight negligence, inadvertence, mistake, or error resulted in noncompliance. Consideration

will be given to the complexity of the facts and the difficulty of the tax law and the issue involved, and also to the existence or lack of clear rules or instructions covering the taxpayer's situation.

(3) Ignorance of the law or an erroneous belief as to the need to comply with a revenue law constitutes reasonable cause when there are facts and circumstances, which indicate ordinary care, and prudence was exercised by the taxpayer.

(a) For example, ignorance of the law or an erroneous belief held by the taxpayer is a basis for reasonable cause when the taxpayer has a limited knowledge of business, a limited education, limited experience in Florida tax matters, or advice received from a competent advisor was relied upon in complying with the provisions of a revenue law.

(b) A good faith belief held by a taxpayer with limited business knowledge, limited education, or limited experience with Florida tax matters is a basis for reasonable cause when there is reasonable doubt as to whether compliance is required in view of conflicting rulings, decisions, or ambiguities in the law.

(4) Reliance upon the erroneous advice of an advisor is a basis for reasonable cause when the taxpayer relied in good faith upon written advice of an advisor who was competent in Florida tax matters and the advisor acted with full knowledge of all of the essential facts. Informal advice, advice based upon insufficient facts, advice received in cases where facts were deliberately concealed, or obviously erroneous advice are not grounds for reasonable cause. To establish reasonable cause based upon reliance on the advice of a competent advisor, the taxpayer shall demonstrate:

(a) That the taxpayer sought timely advice of a person who was competent in Florida tax matters;

(b) That the taxpayer provided the advisor with all of the necessary information and withheld nothing; and

(c) That the taxpayer acted in good faith upon written advice actually received from the advisor.

(5) Reasonable reliance upon the express terms of written advice given by the Department establishes reasonable cause when the taxpayer shows that the advice was timely sought from a departmental employee and that all material facts were disclosed, and that the express terms of the advice were actually followed. "Written advice" for purposes of establishing reasonable cause as a basis for compromise of penalties includes a writing issued to the same taxpayer by the Department in response to that taxpayer's request for advice. The determination whether the taxpayer has reasonably relied on such written advice will be made in accordance with the criteria for determining if a taxpayer has reasonably relied on a written determination for purposes of compromise of tax and interest as set forth in subsection 12-13.005(2), F.A.C.

(6) Reliance upon another person to comply with filing requirements, or to obtain information, or to properly prepare returns or reports, is a basis for reasonable cause, depending upon the circumstances. Noncompliance due to nonperformance of a ministerial-type function, inadvertent misplacement of returns, reports, or information, or the failure of the taxpayer's agent to properly prepare or file returns or reports are each a basis for reasonable cause when the taxpayer establishes that adequate procedures or

steps for complying existed; that the person responsible for performing the function ordinarily performed the task properly; or, that extenuating or unusual circumstances prevented compliance.

(7)(a) Death, illness, or incapacity of the taxpayer is a basis for reasonable cause when such circumstances directly prevented compliance or adversely affected the taxpayer’s ability to comply. An unexplained or unsupported claim of noncompliance due to death, illness, or incapacity is not a basis for reasonable cause. It must be shown that the death, illness, or incapacity directly prevented compliance, in spite of reasonable efforts to comply.

(b) Death, illness, or incapacity of a member of the taxpayer’s immediate family, or of a person solely responsible for maintaining information necessary to comply, or of a person with sole authority to prepare required returns or reports is a basis for reasonable cause when the noncompliance resulted directly from such a circumstance, in spite of reasonable efforts to comply.

(8) Circumstances beyond a taxpayer's reasonable control, such as acts of war, natural disaster, accidental destruction by fire or other casualty, or unavoidable absence are a basis for reasonable cause when the taxpayer demonstrates such circumstances directly prevented compliance, or adversely affected the taxpayer’s ability to comply.

(9) Reasonable cause shall be presumed to exist whenever a taxpayer voluntarily self-discloses liability for tax, interest, or penalty by contacting the Department in writing to disclose and pay tax and interest due prior to any contact by the Department concerning such liability. The presumption

does not apply when the taxpayer is registered with the Department or has routinely filed returns with the Department and the taxpayer's self-disclosure relates to a delinquency or deficiency that is obvious and would routinely generate a billing if not otherwise self-disclosed.

(10) Reasonable cause shall be presumed to exist whenever a taxpayer voluntarily and timely participates in completion of forms provided to the taxpayer by the Department as part of a self-audit or self-analysis program and promptly remits tax and interest due pursuant to such self-audit or self-analysis.

(11) Reasonable cause shall be presumed to exist whenever a person who is not otherwise required to register as a dealer pursuant to Chapter 212, F.S., purchases consumer goods for personal use pursuant to a mail order sale and remits Florida use tax and interest, either voluntarily or in prompt response to a proposed assessment, assessment, or use tax billing issued by the Department.

(12) Reasonable cause shall be presumed to exist whenever a person who is not otherwise required to register as a dealer pursuant to Chapter 212, F.S., purchases tangible personal property and imports same into Florida for business purposes and remits Florida use tax and interest, either voluntarily or in prompt response to a proposed assessment, assessment, or use tax billing issued by the Department.

(13) Reasonable cause shall be presumed to exist whenever the penalty at issue relates to tax or interest which is compromised on the basis of doubt as to liability or doubt as to collectability.

(14) Subsections (3) through (13) are intended to provide examples and guidance to

taxpayers and Department employees, but should not be construed to limit penalty compromises to only those circumstances described in such subsections. Penalty may be compromised whenever the facts and circumstances demonstrate reasonable cause.

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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.