

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, STATE OF FLORIDA

CIRCLE K ENTERPRISES, INC.,

Plaintiff,

vs.

CASE NO. 2010 CA 1353

FLORIDA DEPARTMENT OF REVENUE,

Defendant.

SUMMONS/ORDEN DE COMPARE CENCIA/CITATION
SERVICE ON A STATE AGENCY

TO/PARA/A:

Lisa Echeverri, Executive Director
Florida Department of Revenue
c/o Nancy Purvis, Agency Clerk
Room 201, Carlton Building
501 South Calhoun Street
Tallahassee, Florida 32399

IMPORTANT

A lawsuit has been filed against you. You have **20 calendar days¹** after this summons is served on you to file a written response to the attached complaint/petition with the clerk of this circuit court, located at 301 South Monroe Street, Tallahassee, FL 32301. A phone call will not protect you. Your written response, including the case number given above and the names of the parties, must be filed if you want the Court to hear your side of the case.

If you do not file your written response on time, you may lose the case, and your wages, money, and property may be taken thereafter without further warning from the Court. There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may call an attorney referral service or a legal aid office (listed in the phone book).

If you choose to file a written response yourself, at the same time you file your written response to the Court, you must also mail or take a copy of your written response to the party serving this

¹ Rule 1.140(a), Florida Rules of Civil Procedure, provides: (2) (A) Except when sued pursuant to FS 768.28, the state of Florida, an agency of the state, or an officer or employee of the state sued in an official capacity shall serve an answer to the complaint or crossclaim, or a reply to a counterclaim, within 40 days after service; (B) When sued pursuant to FS 768.28, the Department of Financial Services or the defendant state agency shall have 30 days from the date of service within which to serve an answer to the complaint or crossclaim or a reply to a counterclaim.

summons at:

PLAINTIFF'S/PETITIONER'S ATTORNEYS:

**James M. Ervin, Jr., Esq.
Bernard Barton, Esq.
Elizabeth Bevington, Esq.
Holland & Knight LLP
Post Office Drawer 810
Tallahassee, Florida 32302-0810**

Copies of all court documents in this case, including orders, are available at the Clerk of the Circuit Court's office. You may review these documents, upon request. You must keep the Clerk of the Circuit Court's office notified of your current address. Future papers in this lawsuit will be mailed to the address on record at the clerk's office.

IMPORTANTE

Usted ha sido demandado legalmente. Tiene veinte (20) días, contados a partir del recibo de esta notificación, para contestar la demanda adjunta, por escrito, y presentarla ante este tribunal. Localizado en: 301 South Monroe Street, Tallahassee, FL 32301. Una llamada telefónica no lo protegerá. Si usted desea que el tribunal considere su defensa, debe presentar su respuesta por escrito, incluyendo el número del caso y los nombres de las partes interesadas. Si usted no contesta la demanda a tiempo, podría perder el caso y podría ser despojado de sus ingresos y propiedades, o privado de sus derechos, sin previo aviso del tribunal. Existen otros requisitos legales. Si lo desea, usted puede consultar a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a una de las oficinas de asistencia legal que aparecen en la guía telefónica.

Si desea responder a la demanda por su cuenta, al mismo tiempo en que presente su respuesta ante el tribunal, usted debe enviar por correo o entregar una copia de su respuesta a la persona denominada abajo.

Si usted elige presentar personalmente una respuesta por escrito, en el mismo momento que usted presente su respuesta por escrito al Tribunal, usted debe enviar por correo o llevar una copia de su respuesta por escrito a la parte entregando esta orden de comparecencia a: Nombre y dirección de la parte que entrega la orden de comparecencia:

PLAINTIFF'S/PETITIONER'S ATTORNEYS:

**James M. Ervin, Jr., Esq.
Bernard Barton, Esq.
Elizabeth Bevington, Esq.
Holland & Knight LLP
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Copias de todos los documentos judiciales de este caso, incluyendo las ordenes, estan disponibles en la oficina del Secretario de Juzgado del Circuito [Clerk of the Circuit Court's office]. Estos documentos pueden ser revisados a su solicitud. Usted debe de mantener informada a la oficina del Secretario de Juzgado del Circuito de su dirección actual. Los papeles que se presenten en el futuro en esta demanda judicial seran enviados por correo a la dirección que este registrada en la oficina del Secretario.

IMPORTANT

Des poursuites judiciaires ont été entreprises contre vous. Vous avez 20 jours consécutifs à partir de la date de l'assignation de cette citation pour déposer une réponse écrite à la plainte ci-jointe auprès de ce tribunal. Qui se trouve à: {L'Adresse} 301 South Monroe Street, Tallahassee, FL 32301. Un simple coup de téléphone est insuffisant pour vous protéger; vous êtes obligés de déposer votre réponse écrite, avec mention du numéro de dossier ci-dessus et du nom des parties nommées ici, si vous souhaitez que le tribunal entende votre cause.

Si vous ne déposez pas votre réponse écrite dans le délai requis, vous risquez de perdre la cause ainsi que votre salaire, votre argent, et vos biens peuvent être saisis par la suite, sans aucun préavis ultérieur du tribunal. Il y a d'autres obligations juridiques et vous pouvez requérir les services immédiats d'un avocat. Si vous ne connaissez pas d'avocat, vous pourriez téléphoner à un service de référence d'avocats ou à un bureau d'assistance juridique (figurant à l'annuaire de téléphones).

Si vous choisissez de déposer vous-même une réponse écrite, il vous faudra également, en même temps que cette formalité, faire parvenir ou expédier une copie au carbone ou une photocopie de votre réponse écrite à la partie qui vous dépose cette citation. Nom et adresse de la partie qui dépose cette citation:

PLAINTIFF'S/PETITIONER'S ATTORNEYS:

James M. Ervin, Jr., Esq.
Bernard Barton, Esq.
Elizabeth Bevington, Esq.
Holland & Knight LLP
Post Office Drawer 810
Tallahassee, Florida 32302-0810

Les photocopies de tous les documents tribunaux de cette cause, y compris des arrêts, sont disponibles au bureau du greffier. Vous pouvez revue ces documents, sur demande. Il faut aviser le greffier de votre adresse actuelle. Les documents de Pavenir de ce proces seront envoyer a l'adresse que vous donnez au bureau du greffier.

THE STATE OF FLORIDA
TO EACH SHERIFF OF THE STATE:

You are commanded to serve this summons and a copy of the complaint in this lawsuit on the above-named person.

DATED: 4/19/10



BOB INZER
CLERK OF THE CIRCUIT COURT

By: 
Deputy Clerk

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT IN AND
FOR LEON COUNTY, FLORIDA

10 APR 16 PM 12:56
9-05
BOB INZER
CLERK CIRCUIT COURT
LEON COUNTY, FLORIDA

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CIRCLE K ENTERPRISES, INC.,

Plaintiff,

vs.

CASE NO. 2010 CA 1353

FLORIDA DEPARTMENT OF REVENUE,

Defendant.

COPY

COMPLAINT

Plaintiff, Circle K Enterprises, Inc. (hereafter, "Enterprises"), pursuant to Chapter 72, Florida Statutes, sues defendant, Florida Department of Revenue (hereafter, "Department"), and alleges:

Identity of the Parties

1. Enterprises is a Delaware corporation having its chief or principal offices in Tempe, Arizona.
2. The Department is an agency of the State of Florida. By law, the Department is vested with the responsibility of regulating, controlling, and fairly administering the revenue laws of the State of Florida, including specifically the laws relating to the imposition and collection of corporate income taxes under Chapter 220, Florida Statutes. §213.05, Fla. Stat. (2009).

Jurisdiction

3. This is an action contesting the legality of the Department's denial of claims by Enterprises for the refund of Florida corporate income taxes.

4. Enterprises timely filed refund claims (the "Refund Claims") for its tax years ending April 24, 2005, April 30, 2006 and April 29, 2007 (jointly hereafter, the "Refund Years").

5. The Department ultimately denied the Refund Claims in a document styled as a Notice of Reconsideration of Refund Denial ("NOR") dated February 16, 2010.

6. This action is authorized by Chapter 72, Florida Statutes, §72.011(1), Fla. Stat. (2009).

7. Venue for this action is proper in this circuit. §72.011(4)(b), Fla. Stat. (2009).

8. The Department's denial of the Refund Claims became final for purposes of Section 72.011, Florida Statutes, when the NOR was issued on February 16, 2010. §72.011(2)(b), Fla. Stat. (2009); Rule 12-6.032(4)(c), Fla. Admin. Code.

9. This action is timely filed. §72.011(2)(a), Fla. Stat. (2009).

10. All legally necessary conditions precedent for the filing of this action have been satisfied.

Background Allegations Common To All Counts

11. Unless expressly stated otherwise, all facts alleged in this Complaint are true for all periods at issue herein.

12. Enterprises is a wholly-owned subsidiary of Circle K Stores, Inc. (hereafter, "Stores"). Stores is a Texas corporation having its principal place of business in Tempe, Arizona.

13. Stores operates convenience stores and markets motor fuel at over 2,100 locations throughout the United States. At these locations, Stores is engaged in the sale of various consumer goods and services.

14. Effective April 30, 1999, pursuant to an asset transfer agreement (hereafter, the "Transfer Agreement"), Stores assigned to Enterprises all of Stores' rights, title and interest to certain trademarks and service marks owned at that time by Stores. The assignment was accomplished by way of a capital contribution of these intangible assets to Enterprises.

15. On April 30, 1999, Enterprises entered into a license agreement with Stores (hereafter, the "License Agreement") pursuant to which Enterprises licensed to Stores the non-exclusive use within the United States of the trademarks and service marks acquired by Enterprises under the Transfer Agreement.

16. Pursuant to the License Agreement, Stores was obligated to pay a royalty to Enterprises for Stores' use of the trademarks and service marks owned by Enterprises. The royalty to be paid by Stores under the License Agreement was 1.5% of the proceeds received by Stores for its domestic sales of goods and services.

17. Enterprises filed timely Florida Corporate Income Tax (hereafter, "FCIT") returns for each of the Refund Years. In those returns, Enterprises reported and paid FCIT on the royalties due from Stores under the License Agreement. After determining that these taxes were paid in error, Enterprises filed the Refund Claims.

COUNT I
Income Subject to FCIT

18. The allegations contained in paragraphs 1 through 17 are incorporated herein by reference.

19. Section 220.11(1), Florida Statutes, imposes the FCIT as follows:

A tax measured by net income is hereby imposed on every taxpayer for each taxable year commencing on or after January 1, 1972, and for each taxable year which begins before and ends after January 1, 1972, for the privilege of *conducting business, earning or receiving income in this state*, or being a resident or citizen of this state. Such tax shall be in addition to all other occupation, excise, privilege, and property taxes imposed by this state or by any political subdivision thereof, including any municipality or other district, jurisdiction, or authority of this state. (*emphasis added*)

20. The royalty income earned by Enterprises during the Refund Years was earned as a result of Store's use of the trademarks and service marks owned by Enterprises.

21. Enterprises was not conducting business in Florida and its income was not earned in Florida during the Refund Years.

22. The Florida Legislature did not intend to subject to the FCIT income of the type earned by Enterprises during the Refund Years. The Florida Legislature only intended to subject to the FCIT income earned in Florida by a corporation physically conducting business **in** Florida.

23. Under the express terms of the statute imposing the FCIT and consistent with the legislative intent underlying the FCIT, the royalty income earned by Enterprises during the Refund Years was not subject to the FCIT.

24. Enterprises was not legally obligated to pay FCIT for the Refund Years because its income was not subject to FCIT.

25. Enterprises is entitled to a refund of all FCIT paid to the Department for the Refund Years.

26. The Department's denial of the Refund Claims was unlawful under the provisions of section 220.11(1), Florida Statutes.

27. Enterprises is legally entitled to a refund of all FCIT paid to the Department for the Refund Years.

COUNT II
Apportionment -- Sales Factor

28. The allegations contained in paragraphs 1 through 27 are incorporated herein by reference.

29. For taxpayers doing business both within and outside of Florida, the FCIT is normally imposed on that portion of the taxpayer's business income that is apportioned to Florida in accordance with Section 220.15, Florida Statutes.

30. The regular apportionment method applied under Section 220.15 takes into consideration three factors – property, payroll and sales – and determines the proportion of a taxpayer's property, payroll and sales within Florida as compared to the taxpayer's property, payroll and sales everywhere (with the sales component double-weighted). FCIT is then imposed on that proportion of the business' total net business income.

31. For taxpayers that are not financial organizations, the property factor of the Section 220.15 apportionment formula includes only real and tangible personal property. Enterprises is not a financial organization for purposes of the FCIT. Enterprises did not own or rent any real or tangible personal property in Florida or elsewhere during the Refund Years.

32. The payroll factor of the Section 220.15 apportionment formula includes amounts paid to employees of the taxpayer. Enterprises did not have any employees or payroll in Florida or elsewhere during the Refund Years.

33. The only potentially relevant factor for purposes of applying the Section 220.15 apportionment formula to Enterprises during the Refund Years was the sales factor.

34. Enterprises' only sales during the Refund Years were the royalties charged to Stores during that period.

35. Section 220.15(5)(a), Florida Statutes, provides:

(5) The sales factor is a fraction the numerator of which is the total sales of the taxpayer in this state during the taxable year or period and the denominator of which is the total sales of the taxpayer everywhere during the taxable year or period.

(a) As used in this subsection, the term "*sales*" means all gross receipts of the taxpayer except interest, dividends, rents, royalties, and gross receipts from the sale, exchange, maturity, redemption, or other disposition of securities. However:

1. Rental income is included in the term if a significant portion of the taxpayer's business consists of leasing or renting real or tangible personal property; and

2. Royalty income is included in the term if a significant portion of the taxpayer's business consists of dealing in or with the production, exploration, or development of minerals.

(emphasis added)

36. As set out in the above-quoted Section 220.15(5)(a), the FCIT apportionment formula sales factor expressly excludes royalty income unless a significant portion of the taxpayer's business consists of dealing in or with the production, exploration, or development of minerals.

37. Enterprises does not deal in or with the production, exploration or development of minerals.

38. Enterprises' FCIT sales factor under Section 220.15 should not have included Enterprises' royalty income for the Refund Years.

39. Enterprises' FCIT sales factor under Section 220.15 should have been zero for the Refund Years.

40. Enterprises' total combined FCIT apportionment factor under Section 220.15 should have been zero for the Refund Years.

41. On its original FCIT returns filed for the refund Years, Enterprises erroneously included its royalty income in its sales factor when calculating the FCIT due for each of those years.

42. Enterprises corrected the error in its original FCIT returns by excluding its royalty income from the sales factor in its FCIT calculation in the Refund Claims.

43. The Department admitted in the NOR that royalties should not be included in the Enterprises' apportionment sales factor under Section 220.15(5), Florida Statutes. However, the Department asserted therein that the royalties were properly included in Enterprises' sales factor based on the provisions of Section 220.152, Florida Statutes.

44. Section 220.152, Florida Statutes, provides:

Apportionment; other methods. --If the apportionment methods of ss. 220.15 and 220.151 do not fairly represent the extent of a taxpayer's tax base attributable to this state, the taxpayer may petition for, or the department may require, in respect to all or any part of the taxpayer's tax base, if reasonable:

- (1) Separate accounting;
- (2) The exclusion of any one or more factors;
- (3) The inclusion of one or more additional factors which will fairly represent the taxpayer's tax base attributable to this state; or

(4) The employment of any other method which will produce an equitable apportionment.

45. Section 220.152 allows the Department to alter the statutory apportionment formula only in very rare instances. *Roger Dean Enterprises, Inc. v. Department of Revenue*, 387, So.2d 358 (Fla. 1980).

46. The Florida Legislature has specifically addressed the treatment of royalty income for purposes of the FCIT apportionment formula and has expressly excluded royalty income from the sales factor. The Department seeks to ignore this express legislative direction through the use of a relief provision intended only for use in extraordinary circumstances.

47. The Department's application of Section 220.152 to include Enterprises' royalty income in the company's FCIT sales factor is directly contrary to the express intentions of the Florida Legislature and is otherwise invalid and unlawful.

48. If Enterprises is subject to the FCIT, Enterprises' royalty income should be entirely excluded from Enterprises' FCIT sales factor for the Refund Years.

49. Exclusion of Enterprises' royalty income from its FCIT sales factor for the Refund Years results in Enterprises having overpaid its FCIT for those years in the amounts set forth in the Amended Returns as corrected in the Protest and subsequent protective amended returns.

50. Enterprises is entitled to a refund of FCIT paid for the Refund Years as claimed in the Amended Returns as corrected in the Protest and subsequent protective amended returns.

COUNT III Apportionment -- Property Factor

51. The allegations contained in paragraphs 1 through 50 are incorporated herein by reference.

52. The regular FCIT apportionment provisions do not include royalty income in the sales factor or intangible personal property in the property factor.

53. The Department has determined that Enterprises' royalty income should be included in FCIT sales factor pursuant to Section 220.152. The Department has not, however, included in Enterprises' property factor the intangible personal property (i.e., trademarks and service marks) that gave rise to the royalty income that the Department insists must be included in Enterprises' sales factor in order to fairly reflect Enterprises' tax base attributable to Florida.

54. If the Department's application of Section 220.152 to Enterprises is authorized at all in these circumstances, the statute must be applied in such a way that it fairly reflects Enterprises' tax base attributable to Florida.

55. Including Enterprises' royalty income in its sales factor without also including its intangible personal property in its property factor does not fairly reflect Enterprises' business activity in or tax base attributable to Florida.

56. If the application of Section 220.152 to Enterprises is authorized at all in these circumstances, it must be applied to include both Enterprises' royalty income and the intangible personal property that generated that income in Enterprises' FCIT apportionment formula.

57. Inclusion of both Enterprises' royalty income and intangible personal property in Enterprises' FCIT apportionment formula results in Enterprises having overpaid its FCIT for the Refund Years.

58. If Enterprises' is subject to FCIT for the Refund Years and if the application of Section 220.152 to Enterprises for the Refund Years is authorized, Enterprises is entitled to a refund of its overpaid FCIT for those years under a proper and lawful calculation of its FCIT apportionment formula.

COUNT IV

Nexus

59. The allegations contained in paragraphs 1 through 58 are incorporated herein by reference.

60. A state can impose its income tax only on entities that have sufficient contacts or nexus with the state to satisfy the requirements of the Due Process and Commerce Clauses of the United States Constitution.

61. Enterprises has no employees located within Florida and owns no property located within Florida. Enterprises has no physical presence within Florida.

62. Enterprises' only connection with Florida is Stores' use in Florida of Enterprises' trademarks and service marks in accordance with the License Agreement.

63. Enterprises' contacts with Florida are not sufficient under the Due Process or Commerce Clauses to allow Florida to impose the FCIT on Enterprises.

64. Enterprises was not legally obligated to pay FCIT for the Refund Years because it did not have sufficient nexus with Florida.

65. Enterprises is entitled to a refund of FCIT paid to the Department for the Refund Years.

66. The Department's denial of the Refund Claims was unlawful under the provisions of the Due Process and Commerce Clauses of the United States Constitution.

67. Enterprises is legally entitled to a refund of all FCIT paid to the Department for the Refund Years.

COUNT V
Interest

68. The allegations contained in paragraphs 1 through 67 are incorporated herein by reference.

69. Section 220.723, Florida Statutes, provides that interest shall be paid on all overpayments of FCIT unless the overpayment is refunded to the taxpayer within three months of the taxpayer's claim for refund of the overpayment.

70. The Department did not refund to Enterprises the refund claimed for the Refund Years within three months of the date Enterprises' made its claims for refund.

71. Enterprises is entitled to interest as provided in Section 220.723 on any FCIT refunded to it for the Refund Years.

Prayer for Relief

WHEREFORE, Plaintiff, Circle K Enterprises, Inc., requests that this Court:

1. Enter an order holding that the Enterprises' income was not subject to FCIT for the Refund Years.

2. In the alternative, enter an order holding that Enterprises was not required to include its royalty income in the FCIT sales factor for the Refund Years.

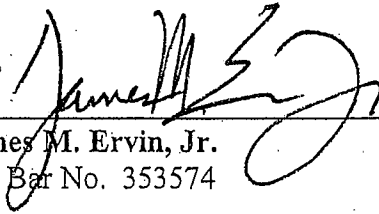
3. In the alternative, enter an order holding that if Enterprises was required to include its royalty income in its FCIT sales factor, it was also entitled to include its intangible personal property in the FCIT property factor.

4. Enter an order holding that Enterprises is entitled to a refund of all FCIT paid for the Refund Years, plus interest on that amount.

5. In the alternative, enter an order holding that Enterprises is entitled to a refund of a portion of the FCIT it paid for the Refund Years, plus interest on that amount.

6. Allow Enterprises its costs herein and any such other relief as may appear to this Court to be equitable and just.

Submitted this 16th day of April, 2010.



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