STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PAUL SOLANO and DIANE SOLANO,	)	
	)	
Petitioners,	)	
	)	
vs.	)	Case No. 03-4272
	)	
DEPARTMENT OF REVENUE,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on February 3, 2004, in Orlando, Florida, before T. Kent Wetherell, II, the designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioners: Chris Kozlowski
640 North Semoran Boulevard
Orlando, Florida 32807

For Respondent: Carrol Y. Cherry, Esquire
Office of the Attorney General
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

STATEMENT OF THE ISSUE

The issue is whether Petitioners owe the taxes, interest, and penalties assessed by the Department of Revenue based upon Petitioners' alleged rental of their real property to a related corporation from June 2000 through August 2003.

PRELIMINARY STATEMENT

Through a Notice of Final Assessment (NOFA) dated September 11, 2003, the Department of Revenue (Department) informed Petitioners that they owed taxes, interest, and penalties amounting to approximately $7,600.00 for the period of June 2000 through August 2003. The basis of the assessment was the Department's determination that Petitioners rented their real property to a related corporation for consideration over that period of time.

By letter filed with the Department on November 10, 2003, Petitioners timely protested the assessment and requested a formal administrative hearing. On November 13, 2003, the Department referred Petitioners' protest to the Division of Administrative Hearings (Division) for the assignment of an administrative law judge to conduct the hearing requested by Petitioners.

The hearing was scheduled for and held on February 3, 2004. Petitioners were represented at the hearing by Chris Kozlowski, who is not an attorney. Mr. Kozlowski was authorized at the hearing to serve as Petitioners' qualified representative. See Fla. Admin. Code R. 28-106.106.

At the hearing, Petitioners presented the testimony of Joylynn Aviles and did not offer any exhibits into evidence. The Department presented the testimony of Paul Solano, Diane

Solano, Terry Milligan, and Carmen Rosamonda. Mr. Rosamonda was accepted as an expert in commercial rent taxation. The Department's Exhibits R1 through R19 were received into evidence.

The one-volume Transcript of the hearing was filed with the Division on February 20, 2004. The parties were given 10 days from the date the Transcript was filed to file their proposed recommended orders (PROs). Petitioners filed a letter summarizing their position in this matter on February 18, 2004, and the Department filed its PRO on March 1, 2004. The parties' post-hearing filings were given due consideration by the undersigned in preparing this Recommended Order.

FINDINGS OF FACT

Based upon the testimony and evidence received at the hearing, the following findings are made:

1. In July 1997, Petitioners acquired the real property located at 640 North Semoran Boulevard in Orlando, Florida (hereafter “the Property”).

2. The Property was acquired in Petitioners’ individual capacities, and they financed the purchase of the Property through a loan secured by a mortgage on the Property. The documents relating to the 1997 loan and mortgage were not introduced at the hearing.

3. At the time the Property was acquired, Petitioner Paul Solano was engaged in the practice of accounting through a sole proprietorship known as P. Solano and Associates. Mr. Solano has been practicing accounting in Florida since 1969 and he is familiar with Florida's sales tax laws.

4. The Property was treated as an asset of Mr. Solano's sole proprietorship even though he was not using it as his place of business at the time. For example, depreciation expense related to the Property was itemized on Petitioners' tax returns as a business expense. The mortgage payments made by Petitioners were also treated as business expenses of the sole proprietorship.

5. In October 1999, Mr. Solano incorporated his accounting practice into an entity known as Solano & Associates Enterprises, Inc. (hereafter "the Corporation"). The sole business of the Corporation is providing accounting services.

6. At the time of its formation, the Corporation was owned in equal 20 percent shares by Mr. Solano, his wife (Petitioner Diane Solano), their two daughters, and their son-in-law. There has been no change in the ownership of the Corporation since its inception.

7. Mr. Solano is the president of the Corporation. The other owners/family members are also officers in the Corporation.

8. Once the Corporation was formed, the depreciation expense related to the Property was included on the Corporation's tax returns, not Petitioners' tax return.

9. At the time the Property was purchased, it was zoned for residential use. Between 1997 and 1999, Petitioners took the necessary steps to get the Property rezoned for commercial use so that the Corporation could conduct its accounting practice from that location.

10. In November 1999, after the property had been rezoned, the Corporation and its owners applied for a loan from First Union National Bank (First Union) to obtain the funds necessary to renovate the existing building on the Property. Although unclear from the documentation in the record, Petitioners both testified that the 1999 loan was effectively a refinancing of the 1997 loan.

11. The Corporation was not able to obtain a loan in its own name because it had only been in existence for a short period of time. The owners of the Corporation were not able to obtain a loan at a favorable interest rate, primarily because of the lack of credit history of Petitioners' daughters and son-in-law. As a result, the loan was obtained by Petitioners in their individual capacities.

12. Petitioners gave a mortgage on the Property as collateral for the 1999 loan. The mortgage document, entitled

“Mortgage and Absolute Assignment of Leases” (hereafter "the 1999 mortgage"), was signed by Petitioners in their individual capacities on November 18, 1999; the Corporation was not identified in the 1999 mortgage in any way.

13. The 1999 mortgage includes boiler-plate language referring to Petitioners’ obligation to maintain and enforce any leases on the Property and requiring the assignment of rents from any such leases to First Union. That language cannot be construed to mean that a lease actually existed at the time; in fact, the Property was still undergoing renovations at the time.

14. The Corporation began doing business from the Property in February 2000 after the renovation work was complete and a certificate of occupancy was issued.

15. The 1999 loan was refinanced in May 2000 with First Union. The loan amount was increased from $145,000 to $200,000 and the term of the loan was extended through a document entitled “Mortgage and Loan Modification and Extension Agreement” (hereafter "the 2000 mortgage").

16. The 2000 mortgage refers to the Corporation as the borrower and refers to Petitioners as the guarantors. Petitioners signed the 2000 mortgage in their individual capacities (to bind themselves as guarantors) as well as their capacities as corporate officers (to bind the Corporation as borrower).

17. The related promissory note, dated May 5, 2000, also refers to the Corporation as the borrower, and it is signed by Petitioners in their capacity as officers of the Corporation.

18. As part of the documentation for the refinancing in 2000, Petitioners executed an “Affidavit of Business Use” in which they attested they were the owners of the Property and that the loan proceeds would be “utilized exclusively for business or commercial purposes and not for personal use.”

19. Petitioners also executed a “Mortgagors" Affidavit” in which they attested that they were in sole possession of the Property and that no other persons have claims or rights to possession of the property “except Solano & Associates Enterprises by virtue of a written lease which does not have an option to purposes or right of first refusal.”

20. The monthly mortgage payment for the refinanced loan was $2,044.91. That amount was due on the fifth day of each month beginning on June 5, 2000, and it was automatically deducted from the Corporation’s bank account with First Union.

21. In addition to making the mortgage payment for the Property, the Corporation paid the ad valorem taxes, insurance, and related expenses. The amount of those payments is not quantified in the record.

22. Petitioners formally deeded the Property to the Corporation in October 2003. Mrs. Solano testified that the failure to do so earlier was simply an "oversight."

23. When the Property was formally deeded to the Corporation, Petitioners did not report any income or loss on the transaction for tax purposes. Any equity that had accumulated in the Property was simply "given" to the Corporation.

24. The First Union mortgages were satisfied in October 2003 as part of a refinancing done by the Corporation with SunTrust bank after it became the owner of the Property.[1] At that point, the Corporation had been in existence long enough to establish a credit history and obtain financing in its own name. The record does not include any documentation related to the 2003 refinancing transaction.

25. Despite the representation in the "Mortgagors' Affidavit" quoted above, there has never been any written or oral lease between Petitioners and the Corporation with respect to the use of the Property.

26. Petitioners have always considered the Property to be a business asset, initially an asset of Mr. Solano's sole proprietorship and then an asset of the Corporation.

27. Petitioners never collected any sales tax from the Corporation on the mortgage payments made by the Corporation.

Petitioners did not consider those payments to be rental payments.

28. In late-June or early-July 2003, the Department sent a letter to Petitioners stating that the Property "appears to be subject to sales tax pursuant to Chapter 212.031, Florida Statutes." The letter was sent as part of the Department's "Corporation Rent Project" through which the Department compares records in various databases to identify commercial properties whose owner of record is different from the business operating at that location.

29. Included with the letter was a questionnaire soliciting information from Petitioners regarding the Property and its use. The questionnaire was completed by Mr. Solano and returned to the Department in a timely manner.

30. Mr. Solano marked a box on the questionnaire indicating that the Property is "[o]ccupied by a corporation in which a corporate officer is the property owner," and he identified the Corporation as the entity occupying the Property.

31. In response to the question as to "which of the following considerations are received by you," Mr. Solano marked the following boxes: "The corporation remits payment for the mortgage loan"; "I do not receive rental income, but the related entity pays the mortgage payments"; and "No consideration is received from this related entity."

32. In response to the questions regarding the “monthly gross rental income of the property” and the “amount of real estate taxes . . . paid on the property by the lessee” for 2000 through 2003, Mr. Solano answered $0 for all periods.

33. Terry Milligan, a tax specialist with the Department, determined based upon Mr. Solano’s responses on the questionnaire that the Corporation’s use of the Property was subject to the sales tax on rentals.

34. Mr. Milligan advised Petitioners of that determination by letter dated July 29, 2003. The letter requested that Petitioners provide “a detailed month by month breakdown of rent (or mortgage payment) amounts, any other consideration, and property taxes that you received from the tenant (or tenant paid on your behalf) for the last thirty-six (36) months).” (Emphasis in original).

35. Petitioners responded to Mr. Milligan’s request through a letter dated August 11, 2003. The letter explained that the reason that the title to the Property appeared under Petitioners’ name rather than the Corporation's name is “due to credit history.” More specifically, the letter stated that “[i]t was decided by the Board members, my wife and our [] children, to put it under our name since we have a long history of good credit.” Included with the letter was a bank statement showing the monthly mortgage payment of $2,044.91 and a notice

of the proposed property tax assessment from Orange County for the Property, which was addressed to the Corporation.

36. In addition to providing the requested documentation to Mr. Milligan, one of Petitioners' daughters, Joylynn Aviles, spoke with Mr. Milligan to explain the circumstances relating to the financing and use of the Property. Ms. Aviles is the Secretary of the Corporation.

37. Ms. Aviles also spoke with Mr. Milligan's supervisor and an individual in the Department's legal division. When it became apparent that the matter could not be resolved informally, Ms. Aviles requested that Mr. Milligan issue a final assessment so that Petitioners could bring a formal protest. In response, the Department issued the NOFA on September 11, 2003.

38. The NOFA was preceded by a spreadsheet dated September 3, 2003, which showed how Mr. Milligan calculated the tax, penalties, and interest amounts set forth in the NOFA.

39. As described in Mr. Milligan's spreadsheet and his testimony at the hearing, the tax was computed based upon the monthly mortgage payments of $2044.91 made by the Corporation from June 2000 to August 2003.

40. The June 2000 start-date for the assessment corresponds to the 36-month period referred to in Mr. Milligan's July 29, 2003, letter; it also happens to correspond to the date that Corporation began making the mortgage payments.

41. The August 2003 end-date for the assessment was used because it was the month preceding the date of the NOFA. The Department has not sought to expand the assessment to include the period between August 2003 and October 2003 when the Property was formally deeded to the Corporation.

42. The NOFA does not include any assessment for the property taxes, insurance or other expenses paid by the Corporation on the Property. The Department has not sought to expand the assessment to include those amounts.

43. The sales tax rate in effect in Orange County during the assessment period was six percent from June 2000 through December 2002, and it was 6.5 percent from January 2003 through August 2003. The 0.5 percent increase resulted from the imposition of a county surtax of some kind.

44. The NOFA calculated a total tax due of $4,784.91. As shown in Mr. Milligan's spreadsheet, that amount was calculated by multiplying the monthly mortgage payment by the tax rate in effect at the time of the payment and then totaling those monthly amounts.

45. The NOFA calculated $465.79 in interest due on the unpaid tax through September 13, 2003. As shown in Mr. Milligan's spreadsheet, that amount was calculated at the applicable statutory rates.

46. Interest continues to accrue at 53 cents per day.

47. The NOFA calculated a penalty due of $2,233.97. That amount was calculated based upon the applicable statutory rate as shown in Mr. Milligan's spreadsheet and explained in the NOFA.

48. In total, the NOFA imposed an assessment of $7,566.43. That amount includes the taxes, interest, and penalties described above.

49. The NOFA informed Petitioners of the procedure by which they could protest the Department's assessment.

50. On November 10, 2003, the Department received Petitioners' timely protest of the assessment. This proceeding followed.

CONCLUSIONS OF LAW

51. The Division has jurisdiction over the parties to and subject matter of this proceeding pursuant to Sections 72.011(1), 120.569, and 120.57(1), Florida Statutes (2003).

52. The Department has the initial burden of proof in this proceeding; its burden is "limited to a showing that an assessment has been made against the taxpayer and the factual and legal grounds upon which the . . . department made the assessment." See § 120.80(14)(b)2., Fla. Stat. (2003); IPC Sports, Inc. v. Dept. of Revenue, 829 So. 2d 330, 332 (Fla. 3d DCA 1992). The standard of proof is a preponderance of the evidence. See § 120.57(1)(j), Fla. Stat. (2003).

53. The Department failed to meet its burden of proof because, as more fully discussed below, the Department's assessment does not have a sound legal basis in light of the facts established at the final hearing and existing case law.

54. Section 212.031(1)(a), Florida Statutes (2000),[2] provides that "every person is exercising a taxable privilege who engages in the business of renting, leasing, letting, or granting a license for the use of any real property . . . ."

55. The tax imposed by Section 212.031, Florida Statutes, is calculated at a rate of six percent of either the "total rent or license fee charged" or the "other thing of value" paid in lieu of rent. See § 212.031(1)(c)-(d),Fla. Stat.

56. The tax is payable by the tenant or person occupying the real property, § 212.031(2)(a), Fla. Stat., and the landlord or owner of the property is required to collect the tax and remit it to the Department just as a "dealer" is required to collect and remit sales tax. See § 212.031(3), Fla. Stat. As a result, if the landlord or property owner fails to collect or remit the tax, then it is liable to the Department for the payment of the tax. See § 212.07(3), Fla. Stat.

57. Petitioners have not argued that they qualify for one of the enumerated statutory exemptions in Section 212.031, Florida Statutes; instead, they argue that the statute does not apply to the circumstances of this case and that the statute

should be narrowly construed to apply only to bona fide lessor/lessee relationships.

58. Petitioners' argument that a narrow construction should be given to Section 212.031, Florida Statutes, in determining its scope is consistent with the "fundamental rule of construction that the authority to tax must be strictly construed against the taxing authority and in favor of the taxpayer and all ambiguities or doubts must be resolved in favor of the taxpayer." See, e.g., Warning Safety Lights of Georgia, Inc. v. Dept. of Revenue, 678 So. 2d 1377, 1379 (Fla. 4th DCA 1996) (citing Maas Bros. v. Dickinson, 195 So. 2d 193 (Fla. 1967)).

59. The circumstances of this case are materially indistinguishable from those in Lord Chumley's of Stuart, Inc. v. Department of Revenue, 401 So. 2d 817 (Fla. 4th DCA 1981). In that case, the appellate court reversed the Department's final order imposing rental tax under the following circumstances:

> Makris [the property owner] purchased the property for the sole purpose of operating the business in question and [] he held title for the corporations; he did not enjoy any of the benefits of ownership. No rent was paid to Makris. The corporations occupied and controlled the properties and paid all of the expenses of carrying the properties. Subsequent to the audits Makris conveyed the properties to the corporations without consideration.

Id. at 818.

60. Under those circumstances, the court agreed with the hearing officer who had concluded that:

> Makris was not engaged in the business of renting the properties and that the payments made by the corporations for mortgage installments, taxes, insurance, etc., were not rent payments.

Id. See also Regal Kitchens, Inc. v. Dept. of Revenue, 641 So. 2d 158, 163 (Fla. 1st DCA 1994) (noting that in Lord Chumley's, there was "no rental agreement of any kind" and that "[t]he character of the relationship between the owner of the land and the operator of the business of [sic] the land was not that of a landlord and tenant").

61. The Department essentially argues in its PRO that Lord Chumley's is no longer good law because the rule in effect at the time of the assessment at issue in that case has been substantially amended. This argument is rejected in light of the fact that Regal Kitchens distinguished Lord Chumley's rather than rejecting it altogether based upon the subsequently adopted rule amendments which were discussed extensively throughout the Regal Kitchens opinion. See Regal Kitchens, 641 So. 2d at 163. See also A.D.E. of Panama City, Inc. v. Dept. of Revenue, Case No. 01-3-FOF, at 15-16 (DOR June 7, 2001) (Final Order in DOAH Case No. 99-4705) (discussing Lord Chumley's as if it is still good law and clarifying that mortgage payments made by the "tenant" on real property owned by the "landlord" are not

subject to the rental tax when the parties have not entered into a rental agreement of any kind).

62. The preponderance of the evidence demonstrates that the character of the relationship between Petitioners and the Corporation is not that of a landlord and tenant. Accordingly, it is concluded based upon the holding in Lord Chumley's that the mortgage payments made by the Corporation are not taxable as rental payments under Section 212.031, Florida Statutes. In reaching this conclusion, the undersigned has not overlooked the Department's argument that Florida Administrative Code Rule 12A-1.070(19) is controlling and leads to the opposite conclusion.

63. Florida Administrative Code Rule 12A-1.070(19), which was promulgated by the Department to interpret and implement Section 212.031, Florida Statutes, provides:

> (a) The lease or rental of real property or a license fee arrangement to use or occupy real property between related "persons," as defined in Section 212.02(12), F.S., in the capacity of lessor/lessee, is subject to tax.
>
> (b) The total consideration, whether direct or indirect, payments or credits, or other consideration in kind, furnished by the lessee to the lessor is subject to tax despite any relationship between the lessor and the lessee.
>
> (c) The total consideration furnished by the lessee to a related lessor for the occupation of real property or the use or entitlement to the use of real property owned by the related lessor is subject to tax, even though the amount of the

> consideration is equal to the amount of the consideration legally necessary to amortize a debt owned by the related lessor and secured by the real property occupied, or used, and even though the consideration is ultimately used to pay that debt.

64. Paragraph (19)(a) of the rule does not apply to the circumstances of this case because Petitioners and the Corporation are not "in the capacity of lessor/lessee" as those terms are commonly used and understood. See Black's Law Dictionary, Sixth Edition, at 902 (defining "lessor" and "lessee"). Of particular significance is the fact that the Corporation's use of the property was not pursuant to a written or oral lease of any kind. Id. See also Regal Kitchens, 641 So. 2d at 163 (noting that the character of the relationship between the landowner and the operator of the business on the land in Lord Chumley's, which is virtually identical to the character of the relationship between Petitioners and the Corporation in this case, "was not that of a landlord and tenant").

65. Paragraph (19)(b) of the rule does not apply because Petitioners did not receive any consideration from the Corporation for the use of the Property. Indeed, the preponderance of the evidence supports Petitioners' claim that the Property was always treated as a business asset of Mr. Solano's sole proprietorship and the subsequently-formed Corporation; and that Petitioners did not receive any benefit

through increased equity in the Property or otherwise from the financing arrangement through which the Corporation made the mortgage payments for the Property.

66. On the latter point, the undersigned has not overlooked Bergh v. Department of Revenue, 1993 WL 943417, **5-7, 9-10 (DOAH Sept. 28, 1993; DOR Dec. 23, 1993), affirmed, 646 So. 2d 204 (Fla. 4th DCA 1994), cited by the Department in its PRO. In that case, the Department concluded that the owners' increased equity in their property resulting from the mortgage payments being made by another person is consideration for purposes of imposing the rental tax. Bergh is distinguishable because in this case, any increase in Petitioners' equity in the Property enured to the benefit of the Corporation when Petitioners "gave" the Property to the Corporation in October 2003; in Bergh, the increase in the property's equity enured to the benefit of the taxpayers because they retained ownership of the property. Bergh and Regal Kitchens are further distinguishable because both of those cases involved financing transactions that were part of larger, more sophisticated business transactions from which the property owners clearly derived financial benefit.[3]

67. Paragraph (19)(c) of the rule does not apply because the debt which is being amortized through the mortgage payments made by the Corporation is not "owned" by Petitioners.

Petitioners are not the borrowers on the 2000 loan, which is the debt secured by the mortgage and is the subject of the mortgage payments which are being taxed by the Department; the Corporation is the borrower. Petitioners are only guarantors on that loan, and in Bergh, supra at **10-11, the Department pointed out that guarantors are of a different status than the maker of a note when discussing and applying Florida Administrative Code Rule 12A-1.070.

68. Stated another way, paragraph (19)(c) of the rule applies only to situations where the property owner is the mortgagor and is therefore legally obligated to make the mortgage payments in the first instance. In those circumstances, it is clear that when the mortgage payments are made by a third party, whether related to the property owner or not, those payments constitute consideration since the property owner/mortgagor would otherwise be obligated to make the payments. However, where the property owner is a guarantor rather than the mortgagor, the property owner is legally obligated to make the mortgage payments only if the mortgagor fails to make them. In those circumstances, which exist in this case, the mortgage payments being made by the non-owner mortgagor do not logically or legally constitute consideration being paid to the property owner/guarantor who is not obligated to make the mortgage payments in the first instance.

69. In the event that the Department rejects the foregoing conclusions and determines that the mortgage payments made by Petitioners are taxable under Section 212.031, Florida Statutes, it becomes necessary to address the propriety of the remainder of the assessment in the NOFA. Therefore, in an abundance of caution, those issues will be addressed below.

70. Although the precise county surtax at issue in this proceeding is not reflected in the record, Section 212.054(2)(a), Florida Statutes, requires county surtaxes to be imposed in the same manner and on the same transactions that are subject to the sales tax. Therefore, in the event that the Department determines that the mortgage payments are subject to tax under Section 212.031, Florida Statutes, it follows that the county surtax was also properly assessed against Petitioners.

71. The interest and penalties shown on the NOFA were properly calculated and assessed. See § 212.12(2)(a), and 212.12(3), Fla. Stat.

72. The Department has authority to compromise all or part of the tax, interest, and penalty assessed against a taxpayer, but it is not required to do so. See § 213.21, Fla. Stat. The taxpayer has the burden to establish the grounds upon which the Department should compromise any of those amounts.

73. A taxpayer's liability for tax or interest may be compromised upon the grounds of "doubt as to liability for or

collectability of such tax or interest." § 213.21(3)(a), Fla. Stat. A taxpayer's liability for penalties may be compromised "if it is determined that the noncompliance is due to reasonable cause and not to willful negligence, willful neglect or fraud." Id.

74. These statutory grounds are further defined by the Department's rules. See generally Fla. Admin. Code R. 12-13.001 through 12-13.010.

75. As more fully discussed below, there are grounds upon which the Department should compromise all or a part of the tax, interest, and penalties assessed against Petitioners even if it determines in its Final Order that the mortgage payments made by the Corporation are subject to tax under Section 212.031, Florida Statutes.

76. With respect to a compromise of the tax or interest, there is no evidence to establish a "doubt as to collectability" as defined in Florida Administrative Code Rule 12-13.006; however, there is evidence to establish a "doubt as to liability" as defined in Florida Administrative Code Rule 12-13.005(1), which provides in pertinent part:

> Doubt as to liability is indicated where there is reasonable doubt whether an action is required in view of conflicting rulings, decisions, or ambiguities in the law, and the taxpayer has exercised ordinary care and prudence in attempting to comply with the revenue laws of this state.

Accord Fla. Admin. Code R. 12-13.0075(1)(a) (listing the factors to be considered by the Department in determining the amount of the tax or interest to be compromised based upon doubt as to liability).

77. As discussed above, there are ambiguities in Section 212.031, Florida Statutes, and Florida Administrative Code Rule 12A-1.070(19) that do not squarely address the circumstances of this case since those authorities, by their terms, are directed primarily to traditional rental transactions involving an actual lessor/lessee relationship. Furthermore, application of Florida Administrative Code 12A-1.070(19) as construed by the Department to the circumstances of this case would effectively result in a decision that conflicts with the decision in Lord Chumley's, which involved materially indistinguishable circumstances.

78. Furthermore, this case does not involve a circumstance where Petitioners' collected tax and failed to remit it to the Department, nor does it involve a circumstance where Petitioners attempted to deceive the Department in any way. To the contrary, the evidence establishes that upon receipt of the letter and questionnaire from the Department advising them of their potential tax liability, Petitioners were forthcoming with Mr. Milligan and the Department in all respects and that they provided Mr. Milligan with all of the information that he requested in a timely manner; and, the undersigned found the

hearing testimony of Petitioners and Ms. Aviles to be credible and found their explanations regarding the events underlying this proceeding to be logical and persuasive.

79. In sum, the evidence establishes that Petitioners' failure to collect any tax and its decision not to immediately pay the tax assessed by the Department was the result of Petitioners' good faith (and ultimately well-founded) belief that no rental tax was due under the circumstances of this case. These circumstances are sufficient to warrant a compromise of the tax and/or interest assessed against Petitioners. See Fla. Admin. Code. R. 12-13.005(1) and 12-13.0075(1)(a)1., 2., and 4.

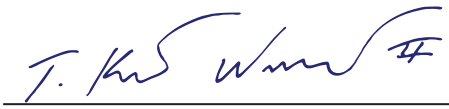
80. With respect to a compromise of the penalties, Florida Administrative Code Rule 12-13.007(13) provides that "[r]easonable cause shall be presumed to exist whenever the penalty at issue relates to a tax or interest which is compromised on the basis of doubt as to liability or doubt as to collectability." In light of the conclusion above that the tax and/or interest should be compromised based upon "doubt as to liability," the penalties should also be compromised.

RECOMMENDATION

Based upon the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that the Department of Revenue issue a final order rescinding the Notice of Final Assessment issued to Petitioners.

DONE AND ENTERED this 17th day of March, 2004, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of March 2004.

ENDNOTES

1/ The Satisfaction of Mortgage received into evidence relates to the 1999 mortgage; the record does not contain a separate satisfaction of the 2000 mortgage and it is unclear whether one exists since the 2000 mortgage is technically a modification of the 1999 mortgage and not a separate mortgage.

2/ All statutory references are to the 2000 version of the Florida Statutes except as otherwise indicated.

3/ The Department argues in its PRO that Petitioners also received other financial benefits, including depreciation deductions for the Property on their personal tax return, a

favorable interest rate when the loan on the Property was refinanced, and an increase in the value of their shares in the Corporation after the Property was transferred to the Corporation. See Department PRO, at 13, 23-24. Those arguments are without merit and/or are not supported by the evidence. With respect to any benefit from the depreciation deduction, it was Mrs. Solano's unrebutted testimony that the Property was included on the Corporation's tax return after its formation. As a result, any depreciation deduction after that point (which is the only period at issue in this case) would have shown up on the Corporation's tax returns and any benefit therefrom would have enured to the Corporation and not Petitioners. Similarly, the favorable interest rate was a benefit to the Corporation, not Petitioners. Any increase in the value of Petitioners' shares in the Corporation after the transfer of the Property would have been off-set by the fact that they no longer owned the Property outright. Stated another way, even though the value of Petitioners' shares in the Corporation theoretically increased by 20 percent of the value of the equity in the Property (which reflects their ownership interest in the Property after the transfer), their personal assets were concomitantly reduced by 50 percent of the value of the Property (which was their ownership interest prior to the transfer).

COPIES FURNISHED:

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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.