

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AMERICAN IMPORT CAR SALES, INC.,

Petitioner,

vs.

Case No. 14-3115

DEPARTMENT OF REVENUE,

Respondent.

_____ /

RECOMMENDED ORDER

This case came before Administrative Law Judge Todd P. Resavage for final hearing by video teleconference on January 15, 2015, at sites in Tallahassee and Fort Lauderdale, Florida.

APPEARANCES

For Petitioner: Joseph C. Moffa, Esquire
Moffa, Gainor and Sutton, P.A.
One Financial Plaza, Suite 2202
100 Southeast Third Avenue
Fort Lauderdale, Florida 33394

For Respondent: Carrol Y. Cherry, Esquire
Department of Legal Affairs
Office of the Attorney General
PL-01, The Capitol
Revenue Litigation Bureau
Tallahassee, Florida 32399-1050

STATEMENT OF THE ISSUE

Whether the Department of Revenue's ("Department") assessment of tax, penalty, and interest against American Import Car Sales, Inc., is valid and correct.

PRELIMINARY STATEMENT

On April 29, 2014, the Department issued a Notice of Reconsideration ("NOR") to Petitioner consisting of tax in the amount of \$2,324,298.42, plus penalties and interest.

Petitioner, on June 30, 2014, filed its Petition for Chapter 120 Hearing to contest the NOR. The matter was referred to the Division of Administrative Hearings ("DOAH") for assignment of an Administrative Law Judge on July 8, 2014.

The final hearing was originally scheduled for September 8, 2014; however, after several continuances, the final hearing transpired on January 15, 2015. At hearing, the Department presented the testimony of Pamela Kruse, Martha Gregory, and Joe Levy, and the Department's Exhibits identified as A through Z, AA through FF, and HH through QQ were admitted. Petitioner presented the testimony of Steven Levy, and Petitioner's Exhibits identified as A through F were admitted.

The final hearing Transcript was filed at DOAH on February 10, 2015. Petitioner filed an Unopposed Motion for Extension of Time to File Proposed Recommended Orders, and said motion was granted. The parties timely filed proposed recommended orders and the same have been considered in drafting this Recommended Order.

Unless otherwise indicated, all rule and statutory references are to the versions in effect during the audit period.

FINDINGS OF FACT

1. The Department is the agency responsible for administering the revenue laws of the State of Florida, including the imposition and collection of the state's sales and use taxes.

2. Petitioner, American Import Car Sales, Inc., is a Florida S-corporation with its principle place of business and mailing address in Hollywood, Florida. Petitioner, during the period of June 1, 2007, through May 31, 2010 ("assessment period"), was in the business of selling and financing new and used motor vehicles.

3. On June 29, 2010, the Department issued to Petitioner a Notice of Intent to Audit Books and Records (form DR-840) for sales and use tax for the assessment period. Said notice informed Petitioner that the audit would begin on or around 60 days from the date of the notice and included an attachment identifying the records and information that would be reviewed and should be available when the audit commenced.

4. Specifically, the Sales and Use Tax Information Checklist attachment requested the following: chart of accounts, general ledgers, cash receipts journals, cash disbursement journals, federal income tax returns, county tangible property returns, Florida Sales and Use Tax returns, sales journals, sales tax exemption certificates (resale certificates), sales invoices, purchase invoices, purchase journals, lease agreements for real

or tangible property, depreciation schedules, bank and financial statements, detail of fixed asset purchases, and other documents as needed.

5. On the same date, in addition to the Notice of Intent, the Department issued to Petitioner, inter alia, an Electronic Audit Survey, and a Pre-Audit Questionnaire and Request for Information.

6. On September 17, 2010, the auditor requested the following records to review by October 4, 2010: (1) general ledger for the assessment period; (2) federal returns for 2007, 2008, and 2009; (3) lease agreement for the business location; (4) deal folders for the assessment period; (5) all expense purchase invoices for the assessment period; (6) all purchase invoices relating to assets added to the Depreciation Schedule during the assessment period; (7) resale/exemption certificates, shipping documents, and any other exempt sales documentation to support exempt sales during the assessment period; (8) bank statements for the assessment periods; and (9) all worksheets used to prepare monthly sales tax returns for the assessment period.

7. On October 5, 2010, the auditor met with Petitioner's President Joe Levy, Petitioner's Secretary Joanne Clements, and Petitioner's Certified Public Accountant, Steve Levy. At that time, Petitioner provided a hard copy of the 2007 and 2008

general ledger and profit and loss statements. At that time, the auditor again advised Petitioner that the Department needed the federal returns, as well as the completed electronic audit survey and pre-audit questionnaire.

8. On October 5, 2010, the Department and Petitioner signed a Consent to Extend the Time to Issue an Assessment or to File a Claim for Refund (form DR-872). The consent provided that assessments or claims for refunds may be filed at any time on or before the extended statute of limitations, December 31, 2011.

9. On October 18, 2010, Petitioner provided the Department with the completed electronic audit survey and pre-audit questionnaire.

10. Thereafter, Petitioner provided the Department with the following books and records: (1) 2009 "deal folders;" (2) Petitioner's general ledger in Excel format for June 1, 2007, through December 31, 2010; (3) January 2009 through May 2010 bank statements; (4) a listing of exempt sales; and (5) lease agreements with attendant invoices.

11. On August 25, 2011, the Department issued its assessment, entitled a Notice of Intent to Make Audit Changes (form DR-1215) ("NOI"). Said notice provided that Respondent owed \$2,324,298.42 in tax, \$581,074.61 in penalties, and \$515,117.04 in interest through August 25, 2011.

12. The NOI addressed Petitioner's alleged failure to collect and remit tax on: (1) certain vehicle sales (audit Exhibit A01-Sales Tax Collected and Not Remitted)^{1/}; (2) vehicle sales with no documentation regarding its exempt status (audit Exhibit A02-Disallowed Exempt Sales)^{2/}; (3) motor vehicle sales where no discretionary tax was assessed (audit Exhibit A03-Discretionary Surtax)^{3/}; and (4) unreported sales (audit Exhibit A04-Unreported Sales). The assessment also related to Petitioner's alleged failure to pay/accrue tax on: (1) taxable purchases (audit Exhibit B01-Taxable Purchases); (2) fixed assets (audit Exhibit B02-Fixed Assets); and (3) commercial rent (Exhibit B03-Commercial Realty).

13. At hearing, Petitioner stipulated that the only component of the NOI remaining at issue pertains to audit Exhibit A04-Unreported Sales, as Petitioner has conceded A01, A02, A03, and all fee schedules.

14. An understanding of audit Exhibit A04, and the assessment methodology employed by the auditor, is articulated in the Department's Exhibit MM, entitled Explanation of Items, which is set forth, in pertinent part, as follows:

Reason for Exhibit:

The records received for the audit were inadequate. The taxpayer provided bank statements for the period of January 2009 through May 2010. This period was deemed the test period for unreported sales. A review of the bank statements for the test period

revealed that sales were underreported. This exhibit was created to assess for sales tax on unreported sales.

Source of Information:

Sales tax returns and Bank of America bank statements for the test period of January 2009 through May 2010; The Department of Motor Vehicles (DMV) [sic] was acquired for the period of June 2007 through May 2010.

Description of Mathematical Adjustments:

The bank statements were reviewed for the period of January 2009 through May 2010. Taxable Sales on sales tax returns, sales tax on sales tax returns, taxable sales on Exhibit on [sic] Exhibit A01, sales tax Exhibit A01 and Exempt Sales on Exhibit A02 was subtracted from Bank Deposits to arrive at unreported sales. See calculations on page 53.

Unreported sales for the period of January 2009 through May 2010 were scheduled into this exhibit. A rate analysis of the DMV database resulted in an effective tax rate of 6.2689. Scheduled transactions were multiplied by the effective tax rate of 6.2689 to determine the tax due on the test period. A percentage of error was calculated by dividing the tax due by the taxable sales for each test period. The percentage of error was applied to taxable sales for each month of the audit period which resulted in additional tax due.

15. The auditor's analysis of the test period, applied to the entire assessment period, resulted in a determination that Petitioner owed \$1,599,056.23 in tax for unreported sales.

16. On August 25, 2011, the auditor met with Joe and Steve Levy to discuss and present the NOI. At that time, Joe and Steve

Levy were advised that Petitioner had 30 days to provide additional documents to revise the NOI.

17. On September 28, 2011, the Department issued correspondence to Petitioner advising that since a response to the NOI had not been received, the case was being forwarded to Tallahassee for issuance of the Notice of Proposed Assessment ("NOPA") (form DR-831).

18. On October 7, 2011, the Department issued the NOPA, which identified the deficiency resulting from an audit of Petitioner's books and records for the assessment period. Pursuant to the NOPA, Petitioner was assessed \$2,324,298.42 in tax, \$31,332.46 in penalty, and \$534,284.54 in interest through October 7, 2011. The NOPA provided Petitioner with its rights to an informal written protest, an administrative hearing, or a judicial proceeding.

19. On December 5, 2011, Petitioner filed its Informal Written Protest to the October 7, 2011, NOPA. The protest noted that the NOPA was "not correct and substantially overstated." The protest raised several issues: (1) that the calculation was primarily based upon bank statement deposits; (2) not all deposits are sales and sources of income; and (3) a substantial amount of the deposits were exempt sales and loans. The protest further requested a personal conference with a Department specialist.

20. On January 10, 2013, Martha Gregory, a tax law specialist and technical assistance dispute resolution employee of the Department, issued correspondence to Petitioner. The documented purpose of the correspondence was to request additional information regarding Petitioner's protest of the NOPA. Among other items, Ms. Gregory requested Petitioner provide the following:

[D]ocumentation and explanations regarding the source of income—vehicle sales, loan payments, etc.—for each deposit. For vehicle sales deposits, provide the customer name, vehicle identification number and amount; for loan payments, provide proof of an existing loan and the amount received from the borrower; and for any other deposits, provide documentation of the source of this income.

21. A conference was held with Petitioner on February 7, 2013. At the conference, Ms. Gregory discussed the January 10, 2013, correspondence including the request for information. The Department did not receive the requested information.

22. Following the conference, the Department provided the Petitioner an additional 105 days to provide documentation to support the protest. Again, Petitioner failed to provide the information requested.

23. On June 14, 2013, the Department issued its Notice of Decision ("NOD"). The NOD concluded that Petitioner had failed to demonstrate that it was not liable for the tax, plus penalty and interest, on unreported sales as scheduled in audit

Exhibit A04, Unreported Sales, as assessed within the compliance audit for the assessment period. Accordingly, the protested assessment was sustained.

24. On July 15, 2013, Petitioner filed a Petition for Reconsideration to appeal the Notice of Decision ("POR"). The POR advanced the following issues: (1) the records examined were not the books and records of Petitioner; (2) the audit should be reduced because the auditor's methodology was incorrect; and (3) the Petitioner should be allowed a credit for bad debts taken during the audit period.

25. At Petitioner's request, on October 22, 2013, Petitioner and Ms. Gregory participated in a conference regarding the POR. At the conference, Petitioner requested a 30-day extension to provide documentation in support of Petitioner's POR. No additional documentation was subsequently provided by Petitioner.

26. On April 29, 2014, the Department issued its Notice of Reconsideration ("NOR"). The NOR sustained the protested assessment. Petitioner, on June 30, 2014, filed its Petition for Chapter 120 Hearing to contest the NOR.

27. Petitioner did not file its federal tax returns for the years 2008, 2009, and 2010 until after the Department issued the NOR. Indeed, the federal returns were not filed until June 3, 2014.^{4/}

28. Ms. Kruse conceded that the auditor's assessment utilized Petitioner's bank statements to determine unreported sales; however, the auditor did not make any adjustments for "unusual items that would have been on the face of the bank statements." Ms. Kruse further acknowledged that the auditor's assessment does not reference Petitioner's general ledger information.

29. Ms. Kruse acknowledged that, for several representative months, the general ledger accurately reported the deposits for the bank statements provided. When presented with a limited comparison of the bank statement and the general ledger, Ms. Kruse further agreed that, on several occasions, deposits noted on the bank statements were probably not taxable transactions; however, the same were included as taxable sales in the auditor's analysis. Ms. Kruse credibly testified that the same appeared to be transfers of funds from one account into another; however, because the Department only possessed the bank statements from one account, and never received the requested "back up information" concerning the other account, the Department could not discern the original source of the funds.

CONCLUSIONS OF LAW

30. DOAH has jurisdiction over the subject matter and parties to this proceeding pursuant to sections 120.569, 120.57(1), and 212.18, Florida Statutes.

31. The Department is the agency authorized to administer the tax laws of the State of Florida. §§ 20.21 and 213.05, Fla. Stat.

32. The Florida sales and use tax is an excise tax on the privilege of engaging in business in the state, not a tax on the property sold. §§ 212.05 and 212.06, Fla. Stat. As noted in section 212.05,

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

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

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

33. Section 212.02(15) defines "sale" to include "[a]ny transfer of title or possession, or both, exchange, barter, license, lease, or rental, conditional or otherwise, in any

manner or by any means whatsoever, of tangible personal property for a consideration."

34. Section 212.02(19) defines "tangible personal property," as follows:

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

35. Section 212.06 defines the term "dealer." There is no dispute that Petitioner is a dealer within the meaning of that definition. Every person who is engaged in business as a dealer under the sales and use tax provisions of chapter 212 must be registered by the Department to collect and remit tax. § 212.18, Fla. Stat.

36. The Department is authorized to prescribe the records to be kept by all dealers that are subject to sales and use tax. § 212.12(6)(a), Fla. Stat. Section 212.12(6)(b) provides as follows:

For the purpose of this subsection, if a dealer does not have adequate records of his or her retail sales or purchases, the department may, upon the basis of a test or sampling of the dealer's available records or

other information relating to the sales or purchases made by such dealer for a representative period, determine the proportion that taxable retail sales bear to total retail sales or the proportion that taxable purchases bear to total purchases. This subsection does not affect the duty of the dealer to collect, or the liability of any consumer to pay, any tax imposed by or pursuant to this chapter.

37. Florida Administrative Code Rule 12-3.0012(3) defines "adequate records," as follows:

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

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

1. Accurate, that is, the records must be free from material error;
2. Inclusive, that is, the records must capture transactions that are needed to determine a tax deficiency or overpayment;
3. Authentic, that is, the records must be worthy of acceptance as based on fact; and
4. Systematic, that is, the records must organize transactions in an orderly manner.

38. Section 212.12(5) addresses the Department's authorization to conduct audits and a dealer's failure to make records available:

(5)(a) The department is authorized to audit or inspect the records and accounts of dealers defined herein, including audits or

inspections of dealers who make mail order sales to the extent permitted by another state, and to correct by credit any overpayment of tax, and, in the event of a deficiency, an assessment shall be made and collected. No administrative finding of fact is necessary prior to the assessment of any tax deficiency.

(b) In the event any dealer or other person charged herein fails or refuses to make his or her records available for inspection so that no audit or examination has been made of the books and records of such dealer or person, fails or refuses to register as a dealer, fails to make a report and pay the tax as provided by this chapter, makes a grossly incorrect report or makes a report that is false or fraudulent, then, in such event, it shall be the duty of the department to make an assessment from an estimate based upon the best information then available to it for the taxable period of retail sales of such dealer, the gross proceeds from rentals, the total admissions received, amounts received from leases of tangible personal property by such dealer, or of the cost price of all articles of tangible personal property imported by the dealer for use or consumption or distribution or storage to be used or consumed in this state, or of the sales or cost price of all services the sale or use of which is taxable under this chapter, together with interest, plus penalty, if such have accrued, as the case may be. Then the department shall proceed to collect such taxes, interest, and penalty on the basis of such assessment which shall be considered prima facie correct, and the burden to show the contrary shall rest upon the dealer, seller, owner, or lessor, as the case may be.

39. Section 212.13(5)(c) provides that, "[o]nly records, receipts, resale certificates, and related documents which are

available to the auditor when such audit begins shall be deemed acceptable for the purposes of conducting such audit."

40. The Department bears the initial burden to demonstrate that the assessment has been made against Petitioner, and the factual and legal grounds upon which the Department made the assessment. The burden then shifts to Petitioner to demonstrate by a preponderance of the evidence that the assessment is incorrect. See IPC Sports, Inc. v. Dep't of Revenue, 829 So. 2d 330, 332 (Fla. 3d DCA 2002); § 120.80(14)(b)2, Fla. Stat.

41. Tax laws should be construed strongly in favor of the taxpayer and against the government with all ambiguities or doubts resolved in the taxpayer's favor. Lloyd Enterprises, Inc. v. Dep't of Revenue, 651 So. 2d 735, 739 (Fla. 5th DCA 1995).

42. Sections 212.12(5)(b) and (6)(b) although mutually exclusive, are identified as the statutory bases for the proposed agency action. The Notice of Decision, in relevant part, provides as follows:

When a dealer fails or refuses to make his or her records available for inspection, the Department is required to make an assessment based upon the best information then available. This assessment is considered prima facie correct, and the burden is on Taxpayer to show the contrary, as referenced in ss. 212.12(5)(b), 212.12(6)(b), F.S.

43. Subsection 212.12(5)(b) would have authorized Respondent to "make an assessment" against Petitioner "from an

estimate based on the best information then available" if it were shown that Petitioner failed or refused to make his records available for inspection "so that no audit or examination has been made of the books and records." While Petitioner did not maintain or provide all of the books and records required and requested, the same is not tantamount to a wholesale failure or refusal. The statutory prerequisite in section 212.12(5)(b) for an estimate, therefore, does not exist in this proceeding, as Petitioner provided bank statements, general ledger documentation, and other documentation.

44. Petitioner did not, as the Department asserts, maintain and/or provide to the Department adequate records within the definition of Florida Administrative Code Rule 12-3.0012(3), after being provided extensions, conferences, and correspondence outlining the needed documentation. Accordingly, the Department was authorized, pursuant to section 212.12(6)(b), upon the basis of a test or sampling of Petitioner's available records or other information relating to the sales or purchases made by Petitioner, to determine the proportion that taxable sales bear to total sales.

45. The undersigned has not been cited to any statute or rule that defines or sets forth the proper methodology for conducting such a "test" or "sampling" where, as here, the dealer's records are inadequate. The only legislative

description of sampling is found in section 212.12(6)(c), the application of which is limited to where a dealer's records are adequate but voluminous in nature and substance. The methodology described in section 212.12(6)(c) was not employed in the instant case.

46. Similarly, the undersigned has not been cited to any statute or rule that sets forth the Department's discretion concerning which of Petitioner's available documents the Department may accept or reject (if any) in conducting sampling or testing.

47. Section 212.13(3), Florida Statutes, provides that books and records kept in the regular course of business include, inter alia, general ledgers. Petitioner provided the Department its general ledger in an Excel format for June 1, 2007, through December 31, 2010 (31 of the 36 months of the audit period).

48. The Department's assessment methodology to determine unreported sales utilizes Petitioner's bank statements, but does not attempt to reconcile and/or incorporate data from Petitioner's general ledger which may (or may not) alter the assessment of unreported sales.

49. The Department met its initial burden demonstrating that an assessment was made against Petitioner, and the factual and legal grounds upon which the Department made the assessment. The undersigned concludes, however, that Petitioner demonstrated

by a preponderance of the evidence that the assessment is flawed in that the Department either: 1) proceeded under section 212.12(5)(b), which is clearly inapplicable as Petitioner provided certain books and records; 2) proceeded under a hybrid application of sections 212.12(5)(b) and (6)(b), which is inappropriate as the subsections are mutually exclusive; or 3) assuming, arguendo, that the Department correctly proceeded only under section 212.12(6)(b), the assessment failed to give appropriate consideration to Petitioner's available records, i.e., the general ledger, contrary to section 212.12(6)(b).

RECOMMENDATION

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

The Department conduct a new assessment of Petitioner's sales and use tax based on a test or sampling of Petitioner's available records or other information relating to the sales or purchases made by Petitioner for a representative period, giving due consideration to Petitioner's available records, including Petitioner's general ledger, to determine the proportion that taxable retail sales bear to total retail sales.

DONE AND ENTERED this 17th day of April, 2015, in
Tallahassee, Leon County, Florida.



TODD P. RESAVAGE
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of April, 2015.

ENDNOTES

^{1/} Audit Exhibit A01 assesses sales tax collected and not remitted. The source of information for this exhibit was the sales tax returns and the Florida Department of Highway Safety and Motor Vehicles ("DMV") database for the entire assessment period. Tax reported in the DMV database was scheduled as tax due in this exhibit for the entire audit period. Tax reported on monthly sales tax returns was scheduled as credits for each month in the audit period. The difference between the tax due and credits resulted in additional tax due.

^{2/} Audit Exhibit A02 assesses exempt sales where Petitioner failed to provide valid exemption documentation. The source of information for this exhibit was sales and use tax returns and a list of exempt sales compiled by Petitioner's Power of Attorney for the period of January 2009 through May 2010. Exempt sales reported in the sales tax returns and the list of exempt sales provided by the Power of Attorney were disallowed and scheduled into this exhibit. This exhibit utilized a rate analysis of the DMV database resulting in an effective tax rate of 6.2689. Scheduled transactions were multiplied by the effective tax rate of 6.2689 to calculate additional tax due.

^{3/} Audit Exhibit A03 assesses sales tax where Petitioner failed to collect the discretionary surtax rate based on the Florida

resident county. The source of information was the DMV database for the entire audit period. Sales contracts in which Petitioner failed to collect the correct discretionary surtax rate based on the applicable Florida county were scheduled and taxed at the applicable tax rate. Sales tax at the 6 percent tax rate was subtracted which resulted in additional county tax due.

^{4/} On November 22, 2013, Petitioner provided the Department with an unsigned and unfiled copy of its 2008 federal income tax return. It appears that Petitioner also provided unsigned, undated, and unfiled copies of the 2009 and 2010 federal income tax returns at some point during the informal protest and/or present proceedings; however, the undersigned is unable to determine from the record when said documents were provided.

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.