

STATE OF FLORIDA
DEPARTMENT OF REVENUE

PATRICK G. SULLIVAN &)
GEORGE WALTER,)
)
Petitioner,)
)
vs.)
)
DEPARTMENT OF REVENUE,)
)
Respondent)
_____)

Case No. 91-4854
DOR 92-2-FOF

FINAL ORDER

This cause is being considered based upon an Amended Recommended Order and an Order Amending Recommended Order issued by a Hearing Officer assigned by the Division of Administrative Hearings, sustaining the Department's assessment. Copies of that Amended Recommended Order and Order Amended Recommended Order are attached to this Final Order and are specifically incorporated by reference as if fully set forth herein.

Accordingly it is ORDERED:

The Department's assessment is sustained as provided in the Hearing Officer's Amended Recommended Order.

Any Party to this Order has the right to seek judicial review of the Order pursuant to Section 120.68, F.S., by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the Clerk of the Department in the Office of General Counsel, Post Office Box 6668, Tallahassee, Florida 32314-6668, and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with

the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this Order is filed with the Clerk of the Department.


DONE AND ENTERED in Tallahassee, Leon County, Florida, this
19th day of March, 1992.

STATE OF FLORIDA
DEPARTMENT OF REVENUE

J. Thomas Herndon
J. Thomas Herndon
Executive Director

CERTIFICATE OF FILING

I HEREBY CERTIFY that the foregoing Final Order has been filed in the official records of the Department of Revenue, this 19th day of March, 1992.



JUDY LANGSTON
AGENCY CLERK

Copies: William R. Cave, Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL. 32399-1550

Ralph R. Jaeger, Esquire, Assistant Attorney General
Department of Legal Affairs
Tax Section, The Capitol
Tallahassee, FL. 32399-1050

Patrick Sullivan
George Walter
1200 North Indian Avenue
Englewood, FL. 34223

Victoria L. Weber, General Counsel
Eric A. de Moya, Esquire, Assistant General Counsel
Department of Revenue
Room 204, Carlton Building
Tallahassee, FL. 32301

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PATRICK G. SULLIVAN &)
GEORGE WALTER,)
)
Petitioners,)
)
vs.) CASE NO. 91-4854
)
DEPARTMENT OF REVENUE,)
)
Respondent.)
_____)

ORDER AMENDING RECOMMENDED ORDER

In accordance with Rule 22I-6.032(1), Florida Administrative Code, the Respondent, Department of Revenue (Department) filed a motion to correct or supplement the Recommended Order in that the undersigned failed to make a finding of fact that the Petitioners had made a partial payment to the Department or to reduce the total amount due by the amount of the partial payment even though the undersigned adopted the Department's proposed finding of fact 18 which set forth the Petitioner's partial payment to the Department. The undersigned's failure to make a finding of fact of the partial payment and to reduce the amount owed by such partial payment was an omission by the undersigned and should be corrected. It is, accordingly,

ORDERED THAT the Recommended Order entered in this cause on December 16, 1991 is amended to reflect a partial payment of \$1,985.88 by the Petitioner to the Department and a reduction in the amount owed by the Petitioner. A copy of the Amended Recommended Order is attached for your records.

DONE and ORDERED this 2nd day of January, 1992 in
Tallahassee, Leon County, Florida.

William R. Cave

WILLIAM R. CAVE
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the Division
of Administrative Hearings this 2nd
day of January, 1992.

Copies furnished:

Ralph R. Jaeger, Esquire
Department of Legal Affairs
Tax Section, Capitol Bldg.
Tallahassee, FL 32399-1050

Vicki Weber, General Counsel
Department of Revenue
204 Carlton Building
Tallahassee, FL 32399-0100

J. Thomas Herndon, Exec. Director
Department of Revenue
104 Carlton Building
Tallahassee, FL 32399-0100

George Walter
1200 North Indian Avenue
Englewood, FL 34223

Case No. - 91-4854

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PATRICK SULLIVAN & GEORGE)
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DEPARTMENT OF REVENUE,)
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AMENDED RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings by its duly designated Hearing Officer, William R. Cave, held a formal hearing in the above-captioned matter on November 12, 1991 in Bradenton, Florida.

APPEARANCES

For Petitioners: George Walter, Qualified
Representative
1200 North Indian Avenue
Englewood, FL 34223

For Respondent: Ralph R. Jaeger, Esquire
Department of Legal Affairs
Tax Section, Capitol Bldg.
Tallahassee, FL 32399-1050

STATEMENT OF THE ISSUES

1. Whether the rental payments for the use of property being used for bona fide agricultural purposes but not classified as agricultural property under Section 193.461, Florida Statutes, are exempt from the imposition of sales tax under Section 212.031(1)(a)1., Florida Statutes.

2. Whether the property in question was granted agricultural classification under Section 193.461, Florida

Statutes by the Property Appraiser of Sarasota County, Florida during the period in question, thereby exempting the rental payments for the use of such property from the imposition of sales tax under Section 212.031(1)(a)1., Florida Statutes.

PRELIMINARY STATEMENT

Sometime before January 12, 1989 the Respondent, Department of Revenue (Department) determined that the Petitioners had been leasing certain real property to [REDACTED] [REDACTED]. but had failed to register and pay sales tax on the rental. The Department made an audit and on January 12, 1989 issued a Notice of Assessment and Jeopardy Finding informing the Petitioners of the delinquent sales and use tax for the period July 1, 1985 through December 31, 1988. A preliminary warrant was enclosed with the notice indicating the estimated tax, penalty and interest. As provided by law, the Petitioners protested the assessment. However, the Department did not issue a Notice of Reconsideration until July 2, 1991. The notice advised the Petitioners as to certain adjustments of the assessed tax and certain compromises on part of the interest and penalty. A Closing Agreement was attached to the notice setting forth the amount of the tax and the amount of the compromised interest and penalty. The Petitioners did not execute the Closing Agreement. Instead, by letter of July 16, 1991, the Petitioners requested a formal administrative hearing. By letter dated August 1, 1991, the Department transferred the matter to the Division of Administrative Hearings and this proceeding ensued.

At the hearing, the Department presented the testimony of Francis Perry. Department's exhibits 1 through 4 were received into evidence. Petitioner Walter testified on behalf of the Petitioners and presented the testimony of Francis Perry. Petitioners did not offer any documentary evidence.

A transcript of the proceeding was filed with the Division of Administrative Hearings on November 25, 1991. The Department timely submitted its Proposed Recommended Order. Petitioners did not file any proposed findings of fact or conclusions of law. A ruling on each proposed finding of fact submitted by the Department has been made as reflected in an Appendix to the Recommended Order.

FINDINGS OF FACT

Upon consideration of the oral and documentary evidence adduced at the hearing, the following relevant findings of fact are made:

1. At all times material to this proceeding the Petitioners, Patrick G. Sullivan and George Walter, as individuals, owned the property in question, having purchased it in 1983 which consisted of six acres being used for bona fide agricultural purposes and two acres for commercial purposes, for a total of eight acres.

2. At all times material to this proceeding, the Petitioners leased the property to [REDACTED] a corporation whose stock was held in its entirety by the Petitioners.

3. Starting in July 1985 through December 1986 the monthly rental (lease) payment to the Petitioners was \$1,916.11 for the eight acres.

4. Starting January 1987 through December 1988 the monthly rental (lease) payment to the Petitioners was \$3,000.00 for the eight acres.

5. At all times material to this proceeding, the Petitioners were not registered as taxpayers with the Department, and neither collected any sales tax from [REDACTED], [REDACTED]. for the rental of the property in question nor remitted any sales tax to the Department for the rental of the property in question.

6. The Department's audit was for the period July 1985 through December 1988.

7. The Department's Tax Warrant Worksheet dated January 11, 1989 indicated that the estimated sales tax due on the rental of the property in question for the audit period to be \$8,400.00 with \$2,100.00 in penalties and \$840.00 in interest added for a combined total of \$11,340.00. A Clerk's filing fee of \$12.00 was added bringing the grand total to \$11,352.00

8. On January 12, 1989 the Department issued a Notice of Assessment and Jeopardy Finding informing the Petitioners of the delinquent sales tax for the audit period.

9. On January 31, 1989 the Petitioners protested the assessment, including the penalty and interest.

10. After some delay, for which the Department assumed responsibility, the Department issued a Notice of Reconsideration

on July 2, 1991 which calculated the tax due for the audit period to be \$5,769.54 with a \$288.48 penalty and interest of \$1,032.04 for a total amount of \$7,090.06.

11. Along with the Notice of Reconsideration the Department included a Closing Agreement wherein it would be settled for a total amount of \$7,090.06 with no interest accruing from January 12, 1989 until payment of the assessment because of the Department's excessive delay in handling the Petitioners' protest.

12. The Petitioners did not execute the Closing Agreement, contending that the rental payments for the use of the six acres being used for bona fide agricultural purposes should have been exempt from the imposition of sales tax under Section 212.031, Florida Statutes. At this point, the Petitioners had presented no evidence that the six acres had been granted agricultural classification pursuant to Section 198.461, Florida Statutes during the audit period.

13. On July 3, 1991, due to the Petitioners' failure to execute the Closing Agreement, the tax assessed began to accrue interest at the statutory rate.

14. For the years 1984 through 1988 the Petitioners neither applied for agricultural classification for the property in question nor did the Property Appraiser of Sarasota County classify the property in question as agricultural pursuant to Section 193.461, Florida Statutes.

15. The sales tax as calculated by the Department for the audit period of July 1985 through December 1988 in the amount

of \$5,769.54 is mathematically correct as is the interest in the amount of \$1,032.04 calculated by the Department. The Department having agreed to compromise the penalty from \$1,307.34 to \$288.48 due to its excessive delay in acting on the petition, there was no evidence to show that the penalty of \$288.48 was excessive, or that the Department acted in an arbitrary or capricious manner in arriving at the amount of the penalty. In fact, the Petitioners do not dispute the calculation of the assessment but only that portion of the assessment contributable to the six acres on the theory that any rental payment for the six acres is exempt from the imposition of sales tax due to the property being used for a bona fide agricultural purpose. In this regard, the Petitioners, at the time of objecting to the Notice of Reconsideration and filing a petition requesting a hearing, paid \$1,442.39 tax, \$255.01 interest and the total penalty of \$288.48. This partial payment of \$1,985.88 reduced the tax owed to \$4,327.15, and the interest owed to \$777.03 as of July 3, 1991 and the penalty to zero.

CONCLUSIONS OF LAW

1. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matters of, this proceeding pursuant to Section 120.57(1), Florida Statutes.

2. Section 212.031(1), Florida Statutes, provides in pertinent part as follows:

. . . every person is exercising a taxable privilege who engaged in the business of renting, leasing . . . any real property unless such payment is:

1. Assessed as agricultural property under Section 193.461, (e.s.)

3. It is clear, setting aside the issue of agricultural assessment, that the Petitioners were exercising a taxable privilege when they rented (leased) the subject property to [REDACTED] [REDACTED] [REDACTED] [REDACTED] and were required by law to collect and remit sales tax on those rental payments to the Department.

4. Additionally, it is clear that Section 212.031(1)(a)1., Florida Statutes, grants an exemption from the imposition of sales tax on rental payment for the use of agricultural assessed property and must be strictly construed against the taxpayer. See, Asphalt Pavers v. Department of Revenue, 584 So.2d 55 (1 DCA Fla. 1991). And, while Petitioners' use of the six acres was for a bona fide agricultural purpose, the property had not been assessed or classified as agricultural property under Section 193.461, Florida Statutes, during the audit period. The taxpayer has the burden of establishing facts to support the entitlement to the exemption. The Petitioners have failed to sustain their burden in this regard.

5. The Department has proven that its assessment of \$7,090.06, which includes penalty and interest, is correct, and that by law the tax as assessed will accrue interest at the rate of \$1.90 per day and will accrue interest at this rate from July 3, 1991 until the date the assessment is paid by the Petitioners.

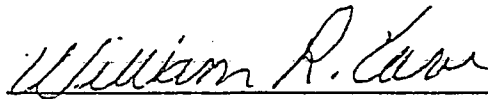
RECOMMENDATION

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

RECOMMENDED:

That the Department enter a Final Order finding Petitioners to owe sales tax on the rental payments for the property in question for the audit period from July 1985 through December 1988 in the amount of \$4,327.15 plus interest amount of \$777.03 for a total amount of \$5,104.18. The \$4,327.15 in tax shall accrue interest at the statutory rate beginning July 3, 1991 until paid.

DONE and ENTERED this 16TH day of December, 1991, in Tallahassee, Florida.



WILLIAM R. CAVE
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 16TH day of December, 1991.

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS: ALL PARTIES HAVE THE RIGHT TO SUBMIT WRITTEN EXCEPTIONS TO THIS RECOMMENDED ORDER. ALL AGENCIES ALLOW EACH PARTY AT LEAST 10 DAYS IN WHICH TO SUBMIT WRITTEN EXCEPTIONS. SOME AGENCIES ALLOW A LARGER PERIOD WITHIN WHICH TO SUBMIT WRITTEN EXCEPTIONS. YOU SHOULD CONTACT THE AGENCY THAT WILL ISSUE THE FINAL ORDER IN THIS CASE CONCERNING AGENCY RULES ON THE DEADLINE FOR FILING EXCEPTIONS TO THIS RECOMMENDED ORDER. ANY EXCEPTIONS TO THIS RECOMMENDED ORDER SHOULD BE FILED WITH THE AGENCY THAT WILL ISSUE THE FINAL ORDER IN THIS CASE.

Copies furnished to:

Vicki Weber, General Counsel
Department of Revenue
204 Carlton Building
Tallahassee, FL 32399-0100

J. Thomas Herndon, Exec. Director
Department of Revenue
104 Carlton Building
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George Walter
1200 North Indian Avenue
Englewood, FL 34223

Ralph R. Jaeger, Esquire
Department of Legal Affairs
Tax Section, Capitol Bldg.
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Case No. - 91-4854

APPENDIX TO RECOMMENDED ORDER
IN CASE NO. 91-4854

The following constitutes my specific rulings pursuant to Section 120-59(2), Florida Statutes, on all of the Proposed Findings of Fact submitted by the parties in the case.

Rulings on Proposed Finding of Fact
Submitted by the Petitioners

No proposed findings of fact submitted by Petitioners.

Rulings on Proposed Findings of Fact
Submitted by the Respondent

1. Not material or relevant to this proceeding.
2. Adopted in Finding of Fact 1.
3. - 7. Adopted in substance as modified in Finding of Fact 14.
8. Not material or relevant to this proceeding.
9. - 11. Adopted in substance as modified in Finding of Fact 1.
12. - 13. Adopted in substance as modified in Findings of Fact 3 and 4, respectively.
14. - 18. Adopted in substance as modified in Findings of Fact 10, 11, 12, 13 and 15.
19. - 21. Not material or relevant to this proceeding.
22. Adopted in substance as modified in Finding of Fact 6.
23. - 24. Not material or relevant.
25. Adopted in substance as modified in Finding of Fact 14.
26. Not material or relevant to this proceeding.
27. Adopted in substance as modified in Findings of Fact 10 and 15.
28. Adopted in substance as modified in Findings of Fact 11 and 13.