

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

F&F AVIATION INC.,
a Delaware corporation,

Plaintiff,

CASE NO.:

JUDGE:

v.

STATE OF FLORIDA,
DEPARTMENT OF REVENUE,

Defendant.

_____ /

COMPLAINT

Plaintiff, F&F AVIATION INC. ("Taxpayer"), pursuant to Chapter 86 and Sections 72.011 and 215.26, Florida Statutes, sues Defendant, the STATE OF FLORIDA, DEPARTMENT OF REVENUE ("the DOR"), and states:

1. This is an action seeking the refund of Taxpayer's payment of a sales tax, plus statutory interest, on a Hawker 400A aircraft, tail number F700A ("Hawker 400A"), owned by Taxpayer and its affiliate company from December 2004 to July 2008. The tax paid must be refunded because the DOR violated Taxpayer's due process rights in the assessment and collection of the tax. The tax must also be refunded because there was no taxable transaction on which sales tax could properly be assessed and collected, and therefore no tax was due and/or the tax was paid in error.

JURISDICTION AND VENUE

2. This Court has jurisdiction of this action pursuant to Sections 68.01, 72.011(1), 215.26, and 86.011, Florida Statutes, and Article V, Section 20(c)(3), Florida Constitution.

3. Venue is proper in Leon County, Florida, pursuant to Section 72.011(4), Florida Statutes.

THE PARTIES

4. Taxpayer is a Delaware corporation with its principal place of business located in Puerto Rico.

5. The DOR is an agency of the State of Florida with the responsibility for the administration and enforcement of Florida's state tax laws, including those dealing with the imposition and refund of Florida's sales tax as provided in Chapter 212, Florida Statutes. The Department's address for the purpose of this proceeding is the General Counsel's Office, 2450 Shumard Oaks Boulevard, Tallahassee, Florida 32399.

6. Taxpayer has complied with all conditions precedent to bringing this action, including all applicable registration requirements contained in Section 72.011, Florida Statutes.

FACTS

Initial Acquisition of the Hawker 400A

7. Fidel Alonso Valls is a Puerto Rico resident and the President of Taxpayer, F&F Aviation.

8. In 2004, Mr. Valls made the decision to acquire the aircraft that is the subject of this lawsuit, the Hawker 400A, through another company he owned, FAV Marine & Aviation, LLC ("FAV Marine").

9. On December 28, 2004, after exploring several financing options, FAV Marine entered into an Aircraft Lease Agreement ("Lease") with AVN Air, LLC, in which FAV Marine was the Lessee and AVN Air the Lessor.

10. The Lease provided that AVN Air would purchase the Hawker 400A from the manufacturer and then lease it to FAV Marine.

11. The capitalized cost of the Hawker 400A at the time the Lease was entered into was listed by the Lessor as \$5,875,000.00

12. The initial acquisition of the Hawker 400A had no connection to Florida. The manufacture of the Hawker 400A was Raytheon Aircraft Company, headquartered in Wichita, Kansas. AVN Air was a Maryland corporation. The Hawker 400A was delivered to Mr. Valls in San Juan, Puerto Rico and hangared there.

13. The State of Florida did not assess a tax for any of the payments made pursuant to the Lease.

Early Purchase Option

14. The Lease contained an Early Purchase Option which permitted the Lessee to purchase the Hawker 400A after 36 months at a specified price.

15. In December 2007, Mr. Valls exercised the Early Purchase Option. For business reasons, Mr. Valls made the decision to exercise the Early Purchase Option in the name of another of his companies rather than in the name of the Lessee, FAV Marine. That company was Taxpayer, F&F Aviation.

16. Mr. Valls was a principal of Taxpayer, just as he was a principal of FAV Marine.

17. As was the case with the initial acquisition of the Hawker 400A through the Lease, there was no Florida connection with the exercise of the Early Purchase Option. At the time Taxpayer exercised the Early Purchase Option, Taxpayer was a Delaware corporation, and the Hawker 400A was still hangared in Puerto Rico. The Early Purchase Option was exercised by Taxpayer in Puerto Rico.

18. Pursuant to FAA requirements, the registration on the Hawker 400A was transferred from FAV Marine to Taxpayer on January 2, 2008. For mailing purposes only, the address on the registration was that of Mr. Valls' vacation home in Fort Lauderdale, Florida.

Trade-In of Hawker 400A

19. After exercising the Early Purchase Option of the Lease, Taxpayer owned the Aircraft for only seven months. In July 2008, Mr. Valls traded in the Hawker 400A and another aircraft, a Hawker 800XP to purchase a third aircraft, a Hawker 750.¹ The trade-in value of the Hawker 400A at the time of the trade-in was listed as \$5,150,000.

The Notice of Intent to Make Assessment

20. On January 5, 2010, the DOR issued a Notice of Intent to Make an Assessment against Taxpayer ("NOI"). The case was assigned Case Number 400030905.

21. The NOI made no sense as it related to Taxpayer. The NOI stated that the notice was for a "sales and use tax" and "reflects tax due for aircraft N-700FA / Model Gulfstream G150 ..." However, Taxpayer never owned a Gulfstream G150.

22. Evidently, after the trade-in, the tail number on the Hawker 400A was changed from its original tail number (N700FA), to N402CD, and the Hawker 400A was registered in the name of the subsequent owner (Eagle One Corp) on August 5, 2008. After the trade-in of the Hawker 400A and the change in its tail number, the original tail number – N700FA – became available and was subsequently assigned to a Gulfstream G150, owned by a party unconnected in any way to either Taxpayer or Mr. Valls.

¹ The Hawker 750 was also subject to a DOR sales and use tax assessment, as was the Hawker 800XP. Thus, a total of three separate tax cases were initiated against Taxpayer. These other two cases were resolved in Taxpayer's favor, leaving only the assessment on the Hawker 400A at issue.

23. The NOI further stated that the tax period was “10/1/2008 – 11/30/2009,” which was several months *after* Taxpayer traded in the Hawker 400A and no longer had possession of it.

24. Finally, the tax assessed (without penalty or interest) was \$870,000. Assuming a 6 percent sales tax, this correlates to an aircraft value of \$14,500,000 – *nearly three times the purchase price paid by Taxpayer when it exercised the Early Purchase Option in December 2007.*

25. The NOI also assessed a penalty in the amount of \$217,500, and interest through 12/19/2009 of \$82,155.77, for a total proposed assessment of \$1,169,655.77.

The Final Assessment

26. On February 10, 2010, the DOR issued its Notice of Final Assessment (“NFA”) in Case No. 400030905. The NFA stated that “you [Taxpayer] owe Sales and Use tax *on the purchase of an aircraft (N700FA).*” While the NFA did not specifically refer to the make and model of the aircraft that was allegedly purchased, the assessed tax mirrored the tax listed on the NOI -- \$870,000, and it presumably was a sales tax on the value of a Gulfstream G150, which was never owned by the Taxpayer. Further, the NFA – just like the NOI – also referenced the tax period as 10/01/2008 – 11/30/2009, which was several months *after* Taxpayer traded in the Hawker 400A and no longer had possession of it.

27. Both notices – the NOI and the NFA – were mailed to the Fort Lauderdale address listed on the registration for the Hawker 400A. Because the primary residence of Taxpayer’s principal, Mr. Valls, was in Puerto Rico, there was a delay in Taxpayer’s receipt of the notices.

The Tax Warrant

28. Because the DOR had not received a response from Taxpayer in response to the NOI and NFA, the DOR issued Tax Warrant 1000000176226 (“Warrant”) on June 9, 2010. The Warrant did not specifically reference a case number, but it did state that it was for a “Sales and

Use Tax” in the amount of \$1,194,512.48, consisting of a “tax due” amount of \$870,000, plus a penalty of \$217,500 and interest due of \$106,992.48 – in short, the amounts assessed on the NOI and the NFA for Gulfstream G150, an airplane that Taxpayer never owned.

29. The Warrant advised Taxpayer to contact the DOR on or before June 29, 2010, to avoid garnishment, levy proceedings or criminal prosecution.

The Amnesty Agreement

30. Having been threatened with the consequences set forth in the tax warrant, Taxpayer, through its prior counsel, Stephen Harper, contacted the DOR and began negotiating an amnesty agreement to reduce the amount of the assessed taxes.

31. An Amnesty Worksheet was produced in connection with Case No. 400030905. The Amnesty Worksheet again stated that the assessed sales tax was \$870,000 and the total with interest and penalties was \$1,387,155.77. The Amnesty Agreement that was ultimately prepared following the negotiations purportedly eliminated the penalties and interest and allowed Mr. Valls to make installment payments of tax. It also reduced the tax due based on the acquisition cost of the Hawker 400A set forth in the Lease agreement.

32. The Amnesty Worksheet also stated that Taxpayer was required to accept the agreement on or before September 30, 2010, or additional interest and penalties would be assessed.

33. With little time to understand the circumstances and facts supporting the Assessment, Mr. Valls elected to sign the Amnesty Agreement.

34. Taxpayer’s prior counsel, Stephen Harper made an immediate payment of \$135,000, and agreed to make additional monthly payments through July 2011.

35. Mr. Valls completed the amnesty payments to the DOR in June 2011, paying a total of \$425,833.14.

First Application for Refund

36. In early 2011, Mr. Valls retained the undersigned law firm to investigate the facts and circumstances surrounding the Assessment. From March 2011 until January 2012, Taxpayer's counsel repeatedly requested documentation from the DOR to support the assessment, but no information was ever provided.

37. Based on information in Taxpayer's possession, it was determined that the tax was paid in error because the tax was assessed on an aircraft never owned by Taxpayer (the Gulfstream G150).

38. On January 12, 2012, Taxpayer, through counsel, filed its first Application for Refund and supporting documentation to the DOR, asserting that the sales tax had been assessed on a Gulfstream G150, an aircraft which had never been owned by Taxpayer.

39. On February 14, 2012, a DOR auditor named James Clampett issued a "Notice of Intent to Make Tax Refund Claim Changes," which stated that it was a proposed "refund denial" and that additional information was needed to consider the refund claim based on an unspecified "third-party source":

Since a third-party source revealed that the aircraft on which the revised assessment figures were based, was listed in the name of F&F Aviation, Inc. for the first 7 months of 2008, I would need proof that your client never owned the aircraft.

40. Clampett's Notice did not identify the aircraft or the mysterious "third-party source", nor did he provide any documentation regarding the purported "revised assessment figures," and so Taxpayer remained in the dark as to why the refund request was being denied.

41. In response to Clampett's notice, Taxpayer, through counsel, requested an informal conference on the grounds that the sales tax had been paid on an airplane Taxpayer never owned, the Gulfstream G150.

42. Instead of scheduling the informal conference, Clampett telephoned Taxpayer's counsel and advised that an informal conference was not necessary because the DOR "knew" that the aircraft on which the assessment was based was a Hawker 400A. Clampett further orally advised that a "revised" Notice of Intent had been issued correcting the tax period, but he refused to provide either the alleged revised notice or the "third party information" when Taxpayer's counsel asked for it.

43. Taxpayer's counsel requested a copy of all documentation in connection with Case No. 400030905 from the Taxpayer Rights Office. No revised Notice of Intent was ever provided identifying the Hawker 400A as the aircraft on which the sales tax was being assessed, nor was a revised Notice of Intent to Assess taxes provided to Taxpayer that identified the tax period as being between January and July 2008.

44. The Taxpayer Rights Office did, however, provide a copy of the Lease between taxpayer's affiliate, FAV Marine, and AVN Air dated December 2004, and stated that the Lease was the "third-party source" upon which the revised assessment was being made.

45. On March 16, 2012, the DOR issued its Notice of Proposed Refund Denial, which denied Taxpayer's first Application for Refund.

46. Taxpayer's counsel continued to attempt to obtain information from the DOR. On February 26, 2013, Taxpayer's counsel received a letter from Thomas K. Butscher, Assistant General Counsel of the DOR. Mr. Butscher confirmed that the notices issued by the DOR did not identify the correct aircraft. However, Mr. Butscher stated that this did not matter, because "it is

clear that the Taxpayer was aware that it was the [Hawker 400A that] was the subject of the assessment in the Audit.”

47. In addition, Mr. Butscher’s letter stated that it was the Lease commitment for the Hawker that established “the corrected tax and interest amounts agreed and paid under the Tax Amnesty Program (**the Taxpayer had exercised a purchase option**).” In other words, the DOR concluded that the buy-out of the Lease constituted a taxable sales transaction warranting the imposition of a sales tax.

Second Application for Refund

48. On February 14, 2013, Taxpayer filed a Second Application for Refund. Taxpayer’s basis for the refund was that, even if the Hawker 400A was the aircraft that was being assessed, the taxes paid by Taxpayer under the Amnesty Agreement were still paid in error because Taxpayer’s exercise of the Early Purchase Option in the Lease occurred between non-Florida parties and outside Florida.

49. The DOR denied Taxpayer’s Second Application for Refund in or about March 2015.

50. Taxpayer now brings this action for a refund of the sales tax paid pursuant to the Amnesty Agreement.

COUNT I – CLAIM FOR REFUND OF SALES TAX PAID

51. Taxpayer realleges and incorporates by reference the allegations of paragraphs 1 through 50 above.

52. Section 215.26, Florida Statutes, dictates that a refund is due to a taxpayer when there has been:

- a. An overpayment of any tax, license, or account due;

- b. A payment where no tax, license, or account is due; and
- c. Any payment made into the State Treasury in error.

53. Taxpayer is entitled to a refund of the tax it paid under the Amnesty Agreement on the following grounds:

- a. Taxpayer was denied due process when it was assessed a sales tax upon a defective notice;
- b. Taxpayer paid the tax in error and/or no tax was due, because the Taxpayer's buy-out of the Lease was not a taxable transaction upon which a Florida sales tax could be based.

54. The DOR's denial of the refund requests was invalid and illegal. The denial must be overturned and the Department must be ordered to approve the Taxpayer's Claim for Refund.

55. Section 213.255, Florida Statutes, mandates that a taxpayer be paid interest on a refund granted based on taxes paid in error or where no tax is due.

WHEREFORE, Taxpayer respectfully request this Court enter an order overturning the DOR's denial of Taxpayer's Claim for Refund, compelling the DOR to approve the Claim for Refund and refunding the taxes paid by Taxpayer plus the applicable statutory interest from the date the taxes were paid, and for such other and further relief as this Court deems just and proper.

COUNT II – CLAIM FOR DECLARATORY JUDGMENT

56. Taxpayer realleges and incorporates by reference the allegations of paragraphs 1 through 50 above.

57. Taxpayer seeks a declaration that the sales tax it paid pursuant to the Amnesty Agreement was paid in error and/or that the sales tax was not due.

58. Taxpayer has a bona fide, actual, present and practical need for the declaration, and the DOR has an actual, present, adverse and antagonistic interest in the subject matter of this lawsuit, either in fact or law.

59. The relief sought is not merely a request for legal advice by the Court.

60. Plaintiff is uncertain of its rights and duties under Chapter 212, Florida Statutes, and seeks a judicial declaration about those rights and duties. Without such a declaration, Taxpayer will be deprived of taxes it paid to the State of Florida in error and/or taxes it paid to the State of Florida when no taxes were due.

WHEREFORE, Taxpayer respectfully requests this Court issue a declaration that the sales tax paid by Taxpayer under the Amnesty Agreement was paid in error and/or was not due, and that Taxpayer is entitled to a refund of those taxes paid, plus interest.

Dated this 2nd day of October, 2015.

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/s/ Denise J. Bleau

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