STATE OF FLORIDA, DEPARTMENT OF REVENUE
TALLAHASSEE, FLORIDA

ELF SERVICES, INC.,

Petitioner,

v.

CASE NO.: 00-1934
DOR 01-1-FOF

STATE OF FLORIDA,
DEPARTMENT OF REVENUE,

Respondent.
_____/

FINAL ORDER

THIS CAUSE came before the Department of Revenue for the purpose of issuing a Final Order. The Administrative Law Judge assigned by the Division of Administrative Hearings heard this cause and issued a Recommended Order. A copy of that Order is attached to this Final Order. No exceptions to the Recommended Order were filed and there are no proposed substituted orders to consider. The Department of Revenue has jurisdiction of this cause.

STATEMENT OF THE ISSUE

The Department adopts and incorporates in this Final Order the Statement of the Issue in the Recommended Order.

PRELIMINARY STATEMENT

The Department adopts and incorporates in this Final Order the Preliminary Statement in the Recommended Order.

FINDINGS OF FACT

The Department adopts and incorporates in this Final Order the Findings of Fact in the Recommended Order.

CONCLUSIONS OF LAW

The Department adopts and incorporates in this Final Order the Conclusions of Law in the Recommended Order.

Based on the foregoing, it is

ORDERED that the Department's Notice of Intent to Levy dated March 30, 2000 be upheld and that garnishment of the funds in Petitioner's account at Admiralty Bank proceed immediately.

DONE AND ENTERED in Tallahassee, Leon County, Florida this 29th day of January, 2001.

STATE OF FLORIDA
DEPARTMENT OF REVENUE

JIM ZINGALE
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 29th day of January, 2001.

JUDY LANGSTON
AGENCY CLERK

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ELF SERVICES, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 00-1934
	)	
DEPARTMENT OF REVENUE,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, a hearing was held in this case in accordance with Section 120.57(1), Florida Statutes, on September 1, 2000, by video teleconference at sites in West Palm Beach and Tallahassee, Florida, before Stuart M. Lerner, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Rafael J. Fanjul, President
ELF Services, Inc.
4109 North Lake Boulevard
Palm Beach Gardens, Florida 33410

For Respondent: John Mika, Esquire
Assistant Attorney General
Office of the Attorney General
The Capitol, Tax Section
Tallahassee, Florida 32399-1050

STATEMENT OF THE ISSUE

Whether Respondent may levy upon property belonging to Petitioner (specially, funds in Petitioner's account, number

[redacted], at Admiralty Bank), as proposed in Respondent's March 30, 2000, Notice of Intent to Levy?

PRELIMINARY STATEMENT

In a Notice of Intent to Levy dated March 22, 2000, the Department of Revenue (Department) advised Petitioner that it intended to levy upon property belonging to Petitioner (specifically, "Bank Account [redacted], in the amount of $2,320.07, . . . in the possession or control of Admiralty Bank") "for nonpayment of taxes, penalty and interest in the sum of $75,581.47." By letter dated April 10, 2000, Petitioner challenged the proposed levy and requested an administrative hearing on the matter. On May 5, 2000, the case was referred to the Division of Administrative Hearings (Division) for the assignment of a Division Administrative Law Judge to conduct the hearing Petitioner had requested.

As noted above, the hearing was held on September 1, 2000.[1] At the outset of the hearing, the parties agreed that it was appropriate to litigate in the instant case a March 30, 2000, Notice of Intent to Levy, identical in all respects to the March 22, 2000, Notice of Intent to Levy, except to the extent that it reflected that Petitioner's account at Admiralty Bank contained $7,293.36, instead of $2,320.07.

Four witnesses testified at the final hearing: Cheryl Kimber, Roberta Diamond, Rafael Fanjul, and William Moore. In addition to the testimony of these four witnesses, 12 exhibits

(Petitioner's Exhibits A through C and Respondent's Exhibits A through I) were offered and received into evidence.

During his testimony, Mr. Fanjul, in his capacity as Petitioner's representative, moved for permission to withdraw the technical admissions resulting (by operation of Rule 1.370(b), Florida Rules of Civil Procedure) from Petitioner's failure to have timely responded to Respondent's Requests for Admissions 7, 15, and 16,[2] a motion the Department opposed.[3] The undersigned deferred ruling on the motion to provide the parties the opportunity to present written argument (in their proposed recommended orders) in support of their respective positions thereon. Evidence relating to the matters asserted in the Department's Requests for Admissions 7, 15, and 16, however, was presented for the undersigned to consider in the event he decided to grant Petitioner's withdrawal motion.

Inasmuch as the "presentation of the merits of the action w[ould] be subserved by it" and the Department has "fail[ed] to satisfy the [undersigned] that withdrawal . . . w[ould] prejudice [the Department]," the undersigned hereby GRANTS Petitioner's motion for leave to withdraw its technical admissions to the matters set forth in the Department's Requests for Admissions 7, 15, and 16. Rule 1.370(b), Florida Rules of Civil Procedure; see also Wilson v. Department of Administration, 538 So. 2d 139 (Fla. 4th DCA 1989), which stands for the proposition that "such relief

[may] be granted even for mere inadvertence," provided that the opposing party is not prejudiced by the withdrawal.

At the conclusion of the evidentiary portion of the hearing, the undersigned, on the record, advised the parties of their right to file proposed recommended orders and established a deadline (30 days from the date of the undersigned's receipt of the transcript of the hearing) for the filing of proposed recommended orders. The hearing Transcript was filed on September 21, 2000. On October 17, 2000, and October 20, 2000, respectively, the Department and Petitioner filed Proposed Recommended Orders. These post-hearing submittals have been carefully considered by the undersigned.

FINDINGS OF FACT

Based upon the evidence adduced at hearing, and the record as a whole, the following findings of fact are made:

1. Petitioner operates a Chevron station at 4109 Northlake Boulevard in Palm Beach Gardens, Florida, at which it engages in the business of selling motor fuels at posted retail prices.

2. Petitioner maintains a business account at Admiralty Bank. The number of its account is [redacted].

3. Petitioner's Local Option Motor Fuel License number is 60-023068.

4. Petitioner was delinquent in remitting to the Department "local option gas tax" payments for the period from July 1, 1995, through June 30, 1996.

5. The Department provided Petitioner notice of Petitioner's failure to make these payments.

6. The Department filed with the Clerk of the Circuit Court in Palm Beach County a Tax Warrant "for collection of delinquent local option gas tax[es]," in the amount of $106,904.62, plus penalties (in the amount of $59,556.47), interest (in the amount of $12,026.25), and the amount of the "filing fee" ($12.00), for a "grand total" of $178,499.34.

7. Rafael Fanjul is the president and sole owner of Petitioner.

8. On May 2, 1997, Mr. Fanjul, on behalf of Petitioner, entered into a Stipulation Agreement with the Department, which provided as follows:

> THE FLORIDA DEPARTMENT OF REVENUE AND ELF SERVICES, D/B/A PALM BEACH CHEVRON S/S 4806, THE TAXPAYER, TAX IDENTIFICATION NO. [redacted], HEREBY AGREE THAT THE $178,024.29 TAX LIABILITY IS DUE THE STATE OF FLORIDA. IT IS FURTHER AGREED THE SUM OF TAX, PENALTY, AND INTEREST REFERENCED ON THE WARRANT OR WARRANTS DATED 02/20/97 IS SUBJECT TO THE FOLLOWING STIPULATIONS:
>
> 1. The taxpayer will retire the tax, penalty, and interest shown on the Tax Warrant or Warrants whose dates or dates are shown above.
>
> 2. The taxpayer waives any and all rights to institute any further judicial or administrative proceedings under S.72.011, F.S., with respect to this liability and;
>
> 3. The taxpayer further agrees to meet each payment term which is detailed on the Amortization Schedule and Payment Coupons provided by the Department of Revenue.

> IN THE EVENT THE TAXPAYER FAILS TO MEET THE PAYMENT TERMS DETAILED ON THE ENCLOSED AMORTIZATION SCHEDULE AND PAYMENT COUPONS OR FAILS TO TIMELY REMIT ALL TAXES WHICH BECOME DUE AND PAYABLE SUBSEQUENT TO THE DATE OF THIS AGREEMENT, ANY UNPAID BALANCE OF TAX, PENALTY, AND/OR INTEREST SCHEDULED PURSUANT TO THIS AGREEMENT SHALL BECOME IMMEDIATELY DUE AND PAYABLE.

Mr. Fanjul had the authority to bind Petitioner to the terms set forth in the Stipulation Agreement. There has been no showing that, in so doing, he acted involuntarily or under coercion or duress.

9. Petitioner made some, but not all of the payments, set forth on the Amortization Schedule incorporated by reference in the Stipulation Agreement.[4]

10. On May 1, 1998, Petitioner entered into a second Stipulation Agreement with the Department, which provided as follows:

> THE FLORIDA DEPARTMENT OF REVENUE AND ELF SERVICES, D/B/A PALM BEACH CHEVRON S/S 4806, THE TAXPAYER, TAX IDENTIFICATION NO. [redacted], HEREBY AGREE THAT THE $142,701.38 TAX LIABILITY IS DUE THE STATE OF FLORIDA. IT IS FURTHER AGREED THE SUM OF TAX, PENALTY, AND INTEREST REFERENCED ON THE WARRANT OR WARRANTS DATED 02/20/97 IS SUBJECT TO THE FOLLOWING STIPULATIONS:
>
> 1. The taxpayer will retire the tax, penalty, and interest shown on the Tax Warrant or Warrants whose dates or dates are shown above.
>
> 2. The taxpayer waives any and all rights to institute any further judicial or administrative proceedings under S.72.011, F.S., with respect to this liability and;

3. The taxpayer further agrees to meet each payment term which is detailed on the Amortization Schedule and Payment Coupons provided by the Department of Revenue.

IN THE EVENT THE TAXPAYER FAILS TO MEET THE PAYMENT TERMS DETAILED ON THE ENCLOSED AMORTIZATION SCHEDULE AND PAYMENT COUPONS OR FAILS TO TIMELY REMIT ALL TAXES WHICH BECOME DUE AND PAYABLE SUBSEQUENT TO THE DATE OF THIS AGREEMENT, ANY UNPAID BALANCE OF TAX, PENALTY, AND/OR INTEREST SCHEDULED PURSUANT TO THIS AGREEMENT SHALL BECOME IMMEDIATELY DUE AND PAYABLE.

Mr. Fanjul had the authority to bind Petitioner to the terms set forth in the second Stipulation Agreement. There has been no showing that, in so doing, he acted involuntarily or under coercion or duress.

11. Petitioner made some, but not all of the payments, set forth on the Amortization Schedule incorporated by reference in the second Stipulation Agreement.[5]

12. On August 12, 1999, Petitioner entered into a third Stipulation Agreement with the Department, which provided as follows:

THE FLORIDA DEPARTMENT OF REVENUE AND ELF SERVICES, D/B/A PALM BEACH CHEVRON S/S 4806, THE TAXPAYER, TAX IDENTIFICATION NO. [redacted], HEREBY AGREE THAT THE $88,375.04 TAX LIABILITY IS DUE THE STATE OF FLORIDA. IT IS FURTHER AGREED THE SUM OF TAX, PENALTY, AND INTEREST REFERENCED ON THE WARRANT OR WARRANTS DATED 02/20/97 IS SUBJECT TO THE FOLLOWING STIPULATIONS:

1. The taxpayer will retire the tax, penalty, and interest shown on the Tax Warrant or Warrants whose dates or dates are shown above.

2. The taxpayer waives any and all rights to institute any further judicial or administrative proceedings under S.72.011, F.S., with respect to this liability and;

3. The taxpayer further agrees to meet each payment term which is detailed on the Amortization Schedule and Payment Coupons provided by the Department of Revenue.

IN THE EVENT THE TAXPAYER FAILS TO MEET THE PAYMENT TERMS DETAILED ON THE ENCLOSED AMORTIZATION SCHEDULE AND PAYMENT COUPONS OR FAILS TO TIMELY REMIT ALL TAXES WHICH BECOME DUE AND PAYABLE SUBSEQUENT TO THE DATE OF THIS AGREEMENT, ANY UNPAID BALANCE OF TAX, PENALTY, AND/OR INTEREST SCHEDULED PURSUANT TO THIS AGREEMENT SHALL BECOME IMMEDIATELY DUE AND PAYABLE.

Mr. Fanjul had the authority to bind Petitioner to the terms set forth in the third Stipulation Agreement. There has been no showing that, in so doing, he acted involuntarily or under coercion or duress.

13. The Amortization Schedule incorporated by reference in the third Stipulation Agreement required Petitioner to make 47 weekly payments of $1,000.00 each from August 12, 1999, to June 29, 2000, and to make a final payment of $28,994.57 on July 6, 2000.

14. As of January 12, 2000, Petitioner was five payments behind. Accordingly, on that date, the Department sent a Notice of Delinquent Tax to Admiralty Bank, which read as follows:

RE: ELF SERVICES INC.
DBA: PALM BEACH GARDENS CHEVRON STA 48206
FEI: [redacted]
ACCT: [redacted] and all others
ST#: 60-023068

To Whom It May Concern:

You are being notified, under the authority contained is Subsection 212.10(3), Florida Statutes, that the referenced dealer is delinquent in the payment of gas tax liabilities in the amount of $75,581.47 to the State of Florida.

You may not transfer or dispose of any credits, debts, or other personal property owed to the dealer, that are to become under your control during the effective period of this notice. Any assets in your possession exceeding the dollar amount shown above may be released in the ordinary course of business. This notice shall remain in effect until the Department consents to a transfer or disposition or until sixty (60) days elapse after receipt of this notice, whichever period expires the earliest.

Please furnish a list of all credits, debts, or other property owed to the dealer in your possession and the value of these assets to the Department. Chapter 212.10(3), F.S. requires this list within five (5) days.

If you fail to comply with this notice, you may become liable to the State of Florida to the extent of the value of the property or amount of debts or credits disposed of or transferred.

Thank you for your cooperation. If you have any questions, please contact the undersigned at the telephone number below.

15. On or about January 18, 2000, in response to the foregoing notice, Admiralty Bank advised the Department in writing that "the balance being held" in Petitioner's account at the bank was $2,223.53.

16. On February 10, 2000, the Department sent Admiralty Bank a Notice of Freeze, which read as follows:

RE: Elf Services Inc.
DBA Palm Beach Gardens Chevron
FEI: [redacted]
ACCT: [redacted] and all others
ST#: 60-023068
Dear Custodian:

You are hereby notified that pursuant to Section 213.67, Florida Statutes, the person identified above has a delinquent liability for tax, penalty, and interest of $75,581.47, which is due the State of Florida.

Therefore, as of the date you receive this Notice you may not transfer, dispose, or return any credits, debts, or other personal property owned/controlled by, or owed to, this taxpayer which are in your possession or control. This Notice remains in effect until the Department of Revenue consents to a transfer, disposition, or return, or until 60 consecutive calendar days elapse from the date of receipt of this Notice of Freeze, whichever occurs first.

Further, Section 213.67(2), F.S., and Rule 12-21, Florida Administrative Code, require you to advise the Department of Revenue, within 5 days of your receipt of this Notice, of any credits, debts, or other personal property owned by, or owed to, this taxpayer which are in your possession or control. You must furnish this information to the office and address listed below.

Your failure to comply with this Notice of Freeze may make you liable for the amount of tax owed, up to the amount of the value of the credits, debts or personal property transferred.

Thank you for your cooperation. If you have any questions please contact the undersigned at the telephone number listed below.

17. On March 22, 2000, the Department sent to Petitioner a Notice of Intent to Levy upon Petitioner's "Bank Account [redacted], in the amount of $2,320.07, . . . in the possession

or control of Admiralty Bank" "for nonpayment of taxes, penalty and interest in the sum of $75,581.47."

18. After receiving information from Admiralty Bank that Petitioner actually had $7,293.36 in its account at the bank, the Department, on March 30, 2000, sent Petitioner a second Notice of Intent to Levy, which was identical in all respects to the March 22, 2000, Notice of Intent to Levy except that it reflected that Petitioner's account at Admiralty Bank contained $7,293.36, instead of $2,320.07.

19. Petitioner's account at Admiralty Bank does not contain any monies paid by a third party to Petitioner as salary or wages.

20. The amount of the Petitioner's current outstanding delinquent "tax liability" is $75,581.47.

CONCLUSIONS OF LAW

21. At all times material to the instant case, Section 336.025(1), Florida Statutes (1995), authorized Florida counties to impose, in addition to other taxes allowed by state law, a "local option gas tax" upon "every gallon of motor fuel and special fuel sold in [the] county."

22. Pursuant to Section 336.025(2)(a), Florida Statutes (1995), the "person engaged in selling at retail motor fuel or using or selling at retail special fuel within a county in which the tax is authorized" was required to collect and remit to the Department this "local option gas tax."

23. During the period from July 1, 1995, through June 30, 1996, Petitioner was such a "person"[6] responsible for collecting and remitting to the Department "local option gas tax" monies."

24. Petitioner failed to fully meet its responsibility.

25. In response to Petitioner's failure to pay "local option gas tax" monies due the Department, the Department, on February 20, 1997, issued and filed with the Clerk of the Circuit Court in Palm Beach County a tax warrant in accordance with Section 206.075, Florida Statutes, which, at all times material to the instant case, authorized the Department, "[u]pon the determination and assessment of the amount of unpaid taxes and penalties due, [to] issue a warrant, under its official seal, directed to the sheriff of any county of the state, commanding said sheriff to levy upon and sell the goods and chattels of such person found within the sheriff's jurisdiction for the payment of the amount of such delinquency, with the added penalties and interest and the cost of executing the warrant and conducting the sale, and to return such warrant to the department and pay the department the money collected by virtue thereof," with the caveat that "any surplus resulting from said sale after all payments of costs, penalties, and delinquent taxes have been made shall be returned to the person in default." The Department's Tax Warrant indicated that it was "for collection of delinquent local option gas tax[es]," in the amount of $106,904.62, plus penalties (in the amount of $59,556.47), interest (in the amount

of $12,026.25), and the amount of the "filing fee" ($12.00), for a "grand total" of $178,499.34.

26. Following the issuance and filing of the Tax Warrant, on May 2, 1997, the Department entered into a stipulated time payment agreement (first Stipulation Agreement) with Petitioner, through Rafael Fanjul, Petitioner's president and sole owner, pursuant to Section 213.21(4), Florida Statutes, which, at all times material to the instant case, has authorized the Department "to enter into agreements for scheduling payments of taxes, interest, and penalties."

27. At all times material to the instant case, Rule 12-17.003, Florida Administrative Code, has set forth the following "[r]equirements for [e]ntering into [s]tipulated [t]ime [p]ayment agreements":

> (1) A taxpayer requesting a stipulated time payment agreement must admit liability for the total amount of tax, interest, and penalty finally determined to be due by the Department.
>
> (2) The taxpayer must demonstrate to the satisfaction of the Department that the taxpayer is currently unable to fully satisfy a liability for tax, interest, or penalty or that a lump sum payment of the amounts due would impose an undue hardship on the taxpayer.
>
> (3) The taxpayer shall also waive the right to institute administrative or judicial proceedings under s. 72.011, F.S., with respect to the liability.

In the first Stipulation Agreement, Petitioner admitted that it owed the Department $178,024.29 as of the date of the agreement

and it agreed to waive "any and all rights to institute any further judicial or administrative proceedings under s. 72.011, F. S., with respect to this liability," as it was required to do by Rule 12-17.003, Florida Administrative Code, in order to obtain the benefit of being able to pay off its liability in installments over a period of time rather than in one lump sum payment. Pursuant to Section 72.011, Florida Statutes (1996), a taxpayer, like Petitioner, had the right to contest the legality of an assessment made by the Department by filing an action in circuit court or filing a petition under the provisions of Chapter 120, Florida Statutes, provided that the taxpayer did so "60 days from the date the assessment bec[ame] final," a requirement that, according to subsection (5) of the statute, was "jurisdictional." Section 120.80(14)(b), Florida Statutes (Supp. 1997), set forth the procedures to be followed in such a "taxpayer contest proceeding." It provided among other things, that, in any "taxpayer contest [administrative] proceeding," "the . . . department's burden of proof, except as otherwise specifically provided by general law, shall be 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."

28. At all times material to the instant case, Rule 12-17.007(7), Florida Administrative Code, has required the Department to "furnish the taxpayer with a detailed schedule of

payments required for satisfaction of the tax, interest, and penalty referenced in the stipulated time payment agreement." Such a "detailed schedule" was appended to and incorporated by reference in the first Stipulation Agreement.

29. At all times material to the instant case, Rule 12-17.008(4), Florida Administrative Code, has provided that, "[i]n all [stipulated time payment] agreements made pursuant to [Chapter 12-17, Florida Administrative Code], interest shall continue to accrue on the unpaid balance of the tax at the rate provided by law." The payment schedule incorporated in the first Stipulated Agreement made provision for the payment of such "additional interest."

30. At all times material to the instant case, Rule 12-17.008(5), Florida Statutes, has provided that, "[u]pon a showing of good cause, the Department is authorized to renegotiate stipulated agreements for an extended period." The Department did so on two occasions (on May 1, 1998, and again on August 12, 1999) in the instant case. In the May 1, 1998, "renegotiate[d] stipulated agreement[]" (second Stipulation Agreement), Petitioner admitted that it owed the Department $142,701.38 as of the date of the agreement. In the August 12, 1999, "renegotiate[d] stipulated agreement[]" (third Stipulation Agreement), it admitted that it owed the Department $88,375.04 as of the date of the agreement. In both of these "renegotiate[d] stipulated agreements," as it had done in the first Stipulation

Agreement, Petitioner indicated that it was waiving "any and all rights to institute any further judicial or administrative proceedings under s. 72.011, F. S., with respect to [its admitted] liability."

31. At all times material to the instant case, Rule 12-17.009, Florida Administrative Code, has provided as follows:

> (1) The Department may void a stipulated time payment agreement under the following conditions:
>
> (a) The taxpayer fails to make full payment when due under the terms of the agreement, or
>
> (b) The taxpayer fails to remit in full taxes which become due and payable after the execution of the agreement.
>
> (2) Before voiding a stipulated time payment agreement, the Department will notify the taxpayer of the failure to meet the terms of the agreement and afford the taxpayer the opportunity to present evidence of timely remittance of the payment(s) in question.
>
> (3) Should the Department void the agreement, any unpaid balance due under the stipulated time payment agreement will immediately become due and payable.
>
> (4) If paragraph (a) or (b) of subsection (1) are applicable or if an agreement has otherwise expired, after notice and demand for payment, the Department may issue a warrant for the remaining liability and may execute that warrant or a warrant previously issued with respect to the liability.
>
> (5) The provisions of the Florida Statutes relating to jeopardy assessments will continue to apply to a taxpayer who has entered into a stipulated time payment agreement.

32. Petitioner failed to make payments in compliance with the Amortization Schedule incorporated by reference in the third Stipulation Agreement. Where a taxpayer, like Petitioner, is noncompliant, the Department has the authority, pursuant to Section 213.67, Florida Statutes, to "[l]evy . . . upon credits, other personal property, or debt" of the noncompliant taxpayer," but "only after the executive director or his or her designee has notified such person in writing of the intention to make such levy." According to Subsection (6)(c) of Section 213.67, Florida Statutes,

> The notice . . . must include a brief statement that sets forth in simple and nontechnical terms:
>
> 1. The provisions of this section relating to levy and sale of property;
>
> 2. The procedures applicable to the levy under this section;
>
> 3. The administrative and judicial appeals available to the taxpayer with respect to such levy and sale, and the procedures relating to such appeals; and
>
> 4. The alternatives, if any, available to taxpayers which could prevent levy on the property.

See also Rule 12-21.204, Florida Administrative Code, which sets forth "procedures," consistent with those prescribed by Section 213.67, Florida Statutes, governing the "issuance of [a] Notice of Intent to Levy." Such a notice of intent to levy was issued and served on Petitioner on or about March 22, 2000, and a second such notice, intended to supercede the first, was issued and

served on Petitioner on or about March 30, 2000. In both notices, the Department stated its intent to levy upon Petitioner's business account at Admiralty Bank, which, as of the date of the second notice, was in the amount of $7,293.36. Petitioner has neither alleged nor shown that this property is exempt from levy pursuant to any statutory or rule provision.[7]

33. A noncompliant taxpayer, like Petitioner, who receives a notice of intent to levy may, in accordance with Subsection (7) of Section 213.67, Florida Statutes, "contest the notice . . . by filing an action in circuit court [or] [a]lternatively, [by] fil[ing] a petition under the applicable provisions of chapter 120." "An action may not be brought to contest a notice of intent to levy under chapter 120 or in circuit court, later than 21 days after the date of receipt of the notice of intent to levy." Section 213.67(8), Florida Statutes.

34. In the instant case, Petitioner contested the Department's proposed action to levy upon Petitioner's account at Admiralty Bank by filing a petition under Chapter 120, Florida Statutes, and an administrative hearing conducted pursuant to Section 120.57(1), Florida Statutes, was held on the matter.

35. At the hearing, the Department established by a preponderance of the evidence[8] that, as of the date of the hearing, Petitioner was delinquent in its payment of taxes, penalties, and interest totaling $75,581.47, an amount greater than "the balance being held" in Petitioner's account at

Admiralty Bank, and no showing was made that any portion of the monies in Petitioner's account is exempt from levy pursuant to Chapter 222, Florida Statutes.

36. In an attempt to demonstrate that it was not liable to the Department in the amount ($75,581.47) alleged in the March 22, 2000, and March 30, 2000, Notices of Intent to Levy, Petitioner, through the testimony of Mr. Fanjul, claimed at hearing that its original "tax liability" was considerably less than the amount ($178,024.29) that Mr. Fanjul, on behalf of Petitioner, stipulated to in the first Stipulation Agreement.[9] According to Mr. Fanjul, he entered into this Stipulation Agreement "under duress." He explained that he had been accused by the Department of having "run off with State funds" and told "that [his] life could be ruined, and [he] could go to jail" if he did not sign the agreement. Under such circumstances, Petitioner argues in its Proposed Recommended Order, its "stipulations should . . . be considered null and void."

37. An agreement may be voided if it is the product of legal duress. "To prove duress under Florida law it must be shown (1) that the act sought to be set aside was effected involuntarily and thus not as an exercise of free choice or will and (2) that this condition of mind was caused by some improper and coercive conduct of the opposite side. . . . However, it is not improper and therefore not duress to threaten what one has a legal right to do." G.E.E.N. Corporation v. Southeast Toyota

Distributors, Inc., 1994 WL 695364 (M.D. Fla. 1994), citing City of Miami v. Kory, 394 So. 2d 494, 497 (Fla. 3d DCA 1981) and Spillers v. Five Points Guaranty Bank, 335 So. 2d 851 (Fla. 1st DCA 1976); see also Paris v. Paris, 412 So. 2d 952, 953 (Fla. 1st DCA 1982)("[T]here can be no duress without there being a threat to do some act which the threatening party has no legal right to do-some illegal exaction or some fraud or deception."). The burden is on the party seeking have the agreement voided to show that the agreement resulted from duress. See Jacobs v. Vaillancourt, 634 So. 2d 667, 671 (Fla. 2d DCA 1994)("[O]nce a proponent makes a prima facie showing of the formal execution and attestation thereof, the burden of proof shifts to the contestant and he must establish the facts constituting the grounds upon which the revocation is sought."); Corporación Peruana de Aeropuertos y Aviación Comercial v. Boy, 180 So. 2d 503, 506 (Fla. 2d DCA 1965)("[T]he burden of proof to show duress . . . is on the Defendant [the party alleging duress].").

38. Petitioner failed to prove that any one of its three Stipulation Agreements with the Department was the product of legal duress. While Petitioner presented Mr. Fanjul's testimony that he was threatened with jail time if he did not sign the first Stipulation Agreement, the greater weight of the evidence establishes that no such threat was made,[10] nor does the record reveal that Department personnel at any time threatened to take

any action against Mr. Fanjul or Petitioner it was not authorized to take.

39. Not having demonstrated that there is any reason to treat either the first Stipulation Agreement, or its successors, as a nullity, Petitioner is bound by the stipulation set forth in each of these agreements as to the amount of its "tax liability" as of the date of the agreement. See Kwastel v. Department of Business and Professional Regulation, 736 So. 2d 762, 763 (Fla. 5th DCA 1999)("[W]e cannot overlook the provisions of the binding stipulation. Appellants agreed not to seek judicial review of the order adopting the stipulation and are thus precluded from challenging the terms of the stipulation and the order adopting same."). While it may now appear to Petitioner, in hindsight, that it made a poor decision in entering into these Stipulation Agreements and "waiv[ing] any and all rights to institute any further judicial or administrative proceedings under S.72.011, F.S. with respect to th[e] liability" to which it stipulated in each agreement, mere dissatisfaction with the outcome of a decision to enter into an agreement does not give the dissatisfied party the right to unilaterally rescind the agreement and proceed as if the agreement had never been made. Cf. Amerifirst Federal Savings and Loan Association v. Cohen, 454 So. 2d 626, 627 (Fla. 3d DCA 1984)("Cohen gained much from this [settlement] agreement and cannot now be permitted to back out of those provisions of the agreement which he deems harsh or

onerous."); and Steinhardt v. Rudolph, 422 So. 2d 884 (Fla. 3d DCA 1982)("All of this does not mean, however, that a court will relieve a party of his obligations under a contract because he has made a bad bargain containing contractual terms which are unreasonable or impose an onerous hardship on him. Indeed, the entire law of contracts, as well as the commercial value of contractual arrangements, would be substantially undermined if parties could back out of their contractual undertakings on that basis. 'People should be entitled to contract on their own terms without the indulgence of paternalism by courts in the alleviation of one side or another from the effects of a bad bargain.'").

40. Because the preponderance of the evidence establishes that Petitioner has an unpaid "tax liability" balance (that, pursuant to the terms of the third Stipulation Agreement, became "immediately due and payable" when Petitioner failed to pay the Department in accordance with the agreement's Amortization Schedule) in excess of the funds in Petitioner's account at Admiralty Bank, and Petitioner has failed to show that these funds are exempt from levy or that there is any other reason why these funds may not be taken by the Department to satisfy Petitioner's "tax liability," the Department should proceed to take the action proposed in its March 30, 2000, Notice of Intent to Levy.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby

RECOMMENDED that the Department enter a final order upholding its March 30, 2000, Notice of Intent to Levy and proceed with the garnishment of the funds in Petitioner's account at Admiralty Bank.

DONE AND ENTERED this 25th day of October, 2000, in Tallahassee, Florida.

STUART M. LERNER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this ____ day of October, 2000.

ENDNOTES

1/ The hearing was originally scheduled for July 14, 2000, but was continued at the parties' request.

2/ Although Petitioner did not timely respond to any of the Department's Requests for Admissions, Mr. Fanjul indicated, on the record at hearing, that Petitioner did not dispute the matters asserted in any of the Department's Requests for Admissions other than Requests 7, 15, and 16.

3/ Rule 1.370(a), Florida Rules of Civil Procedure, provides, in pertinent part, that "the matter is admitted unless the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter

within 30 days after service of the request or such shorter or longer time as the court may allow . . . ." Pursuant to Rule 1.370(b), Florida Rules of Civil Procedure, "[a]ny matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission."

4/ If payments had been made in accordance with the Amortization Schedule, Petitioner's tax debt would have been paid off on April 24, 1998.

5/ If payments had been made in accordance with the Amortization Schedule, Petitioner's tax debt would have been paid off on February 26, 1999.

6/ "Person," was defined in Section 1.01(3), Florida Statutes (1995) as including "individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations."

7/ See Section 222.11, Florida Statutes, which exempts certain "disposable earnings of a head of a family" from garnishment and further provides that such earnings that "are credited or deposited in any financial institution are exempt from . . . garnishment for 6 months after the earnings are received by the financial institution if the funds can be traced and properly identified as earnings."

8/ "Findings of fact [in proceedings conducted pursuant to Section 120.57(1), Florida Statutes] shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute, and shall be based exclusively on the evidence of record and on matters officially recognized." Section 120.57(1)(j), Florida Statutes; see also Florida Department of Health and Rehabilitative Services, Division of Health v. Career Service Commission, 289 So. 2d 412, 415 (Fla. 4th DCA 1974)("'As a general rule the comparative degree of proof by which a case must be established is the same before an administrative tribunal as in a judicial proceeding--that is, A preponderance of the evidence. It is not satisfied by proof creating an equipoise, but it does not require proof beyond a reasonable doubt.'").

9/ In Proposed Finding of Fact 8 in its Proposed Recommended Order, Petitioner asserts that "[t]he total amount of the tax owed as of July 1996 amounted to $84, 521.11" and that "[t]he total amount [owed] at that time including penalty and taxes amounted to $106,000.00."

10/ Mr. Fanjul's testimony was rebutted by William Moore, who testified on behalf of the Department. Mr. Moore was the Department employee who, Mr. Fanjul alleged, had threatened him. Having carefully reviewed their differing versions of the events that led up to the execution of the first Stipulation Agreement to determine which is more plausible, and taking into account Mr. Fanjul's and Mr. Moore's respective interests in the outcome of this case as well as other factors bearing on their credibility, the undersigned has concluded that Mr. Fanjul's testimony that he was threatened by Mr. Moore with jail time should be rejected in favor of Mr. Moore's testimony to the contrary.

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.