

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HAAS PUBLISHING COMPANIES,)
INC.,)
)
Petitioner,)
)
vs.) Case No. 08-3477
)
DEPARTMENT OF REVENUE,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Upon due notice, a disputed-fact hearing was held in this case on February 10 and 11, 2009, in Tallahassee, Florida, before Ella Jane P. Davis, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Martin I. Eisenstein, Esquire
Stacy O. Stitham, Esquire
Brann & Isaacson
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Post Office Box 3070
Lewiston, Maine 04243

For Respondent: Jeffrey M. Dikman, Esquire
Office of the Attorney General
The Capitol Plaza, Level 01
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STATEMENT OF THE ISSUE

Whether the disputed amount within the Revised and Reduced Assessment by DOR against Respondent for the January 1, 2002, through December 31, 2004, audit period is correct and owed.

PRELIMINARY STATEMENT

This case addresses Audit No. 200018360, for the period of January 1, 2002, through December 31, 2004. The cause was referred to the Division of Administrative Hearings (DOAH) on or about July 17, 2008.

The Division's file reflects all pleadings, notices, and orders intervening before the final hearing on February 10-11, 2009.

At hearing, Respondent Department of Revenue (DOR) presented the oral testimony of Charles Wallace.

Petitioner Haas Publishing Companies, Inc. (Haas), presented the oral testimony of Arlene Mayfield, Kim Payne, Rodney Barton, and Curtis Kimball, an expert appraisal witness.

Joint Exhibit A (the Joint Pre-hearing Stipulation) and Joint Exhibits 1 through 30, 31A and 31B, 32 through 52, 59, 69 through 71, 72A and 72B, 73 through 90 and 93D, were admitted in evidence.^{1/} Joint Exhibits 53-63, were admitted in evidence by stipulation, but because these documents were already accessible by the electronic docket sheet, they were not duplicated or physically retained by the undersigned.

Respondent was granted a period of time after the hearing in which to file any additional legislative staff reports in response to, or supplementing, Joint Exhibit 93D, but did not do so.

A four-volume Transcript was filed on February 25, 2009, and each party timely-filed its respective Proposed Recommended Order on April 6, 2009. These Proposals (each of which were permitted to exceed 40 pages) have been utilized as appropriate.

On July 2, 2009, an Order Requiring Memorandum sought further advices of counsel and on July 17, 2009, each party filed its respective supplemental memorandum.

The Parties' 24 "Stipulations of Fact" (with sub-parts) in the Joint Pre-hearing Stipulation have been utilized herein, even though many are legal theories or directions to portions of the record. However, the grammar and syntax of some factual stipulations have been altered for clarity, space considerations, and to avoid unnecessary repetition, or have been relegated to endnotes.

Unless otherwise indicated, all references to Florida Statutes are to the codification in effect at the time of the audit period.

FINDINGS OF FACT

1. Petitioner Haas Publishing Companies, Inc., is a Delaware corporation (now known by the name "Consumer Source")

which is authorized to do business in the State of Florida. At all times material, Haas/Consumer Source was a subsidiary of a company, known as "Primedia, Inc.," which is publically traded on the New York Stock Exchange. (Stipulation 1)

2. Respondent Department of Revenue (DOR) is the agency responsible for the administration and enforcement of Florida's tax laws, including sales and use tax and various local surtaxes. (Stipulation 9)

3. This case concerns DOR's assessment of Florida sales tax and associated interest against Petitioner Haas for the audit period of January 1, 2002, through December 31, 2004. This is the second of two similar proceedings involving Haas and DOR, regarding agreements between Haas and certain national retailers and the distribution of Haas' publications, which agreements involve signing bonuses, space rental, and exclusivity rights. See Haas Publishing Companies v. Department of Revenue, DOAH Case No. 03-2683 (RO: 6/18/2004; Adopted in toto, FO: 11/9/04). (Haas 2003)

4. Haas 2003, was a case which involved many similar, but not identical facts. It involved a tax assessment which arose from a different, earlier audit period. (Stipulation 14)

5. However, this instant cause constitutes a de novo proceeding. ■

6. The contracts at issue in Haas 2003, and the current case are similar, but not identical. The parties agree that the comparison of the Haas 2003 contracts and the Haas 2008, contracts, reflected by Bate Stamp H03161-H03164 is a fair and accurate summary, though the Department disagrees with the characterization of the Bally Total Fitness contract and Blockbuster contracts at H03161 as "identical" in light of the notation that both were amended. (Stipulation 15)

7. Unlike Haas 2003, Haas is no longer arguing that its agreements with retailers do not involve any rental of real property. The parties have stipulated, subsequent to the filing of the Petition, that Haas is not arguing that these contracts are entirely non-taxable, but is only arguing that a portion of the contractual payments should be allocated to exclusivity in the in-market locations, which Haas maintains constitutes an intrinsically valuable intangible asset. (Stipulation 16)

8. Petitioner Haas publishes free consumer guides to local apartments and homes and is paid by the apartment owners, property managers, builders, or developers who advertise in Haas' publications. In 2008, Haas carried its local area guides, including its 77 different apartment guide publications, in approximately 60,000 locations. One of Haas' divisions, Distributech, distributes the guides through rack displays at

retail stores. Haas' racks take up from two to four square feet worth of floor space wherever placed. Haas negotiates with retailers for an appropriate site for its display of publications at each retail location. (Stipulation 2)

9. Haas supplied the magazine racks and was solely responsible for set-up, replenishing, servicing and maintenance of its racks on each retailer's property. (Stipulation 3)

10. Haas considers space near an entrance/exit of a retailer's covered premises to be premium space. Haas maintains that retailers consider this same space to be "dead space," beyond its cash registers, which is essentially useless for display or sale of their (the retailer's) goods. (Stipulation 4)

11. Haas does not sell or distribute any inventory of, or for, the retailer. Haas stocks its own publications and/or those of third parties in its own racks, which racks Haas has placed in the retailer's space. (Stipulation 5)

12. Under the contracts, retailers in whose stores the racks are placed have no obligation to market Haas' publications. These retailers do not buy or sell the publications, nor do they pay to advertise in them. Retailers pay nothing to Haas. (Stipulation 6)

13. None of the retailers ever attempted to charge sales taxes to Haas on the payments made under the written agreements.

Petitioner has not paid the contested tax to DOR or to the retailers, and no retailer has paid the tax on Haas' behalf. (Stipulation 23)

14. However, by the "exclusivity clauses" of its contracts with retailers, Haas acquires the right to exclude Haas' competitors from the whole of the retailer's premises, both inside and outside the retailer's stores. By separate clauses in its contracts, Haas acquires the right to physically occupy, with racks, two-to-four feet of the retailer's store space, which space is "premium" or "dead" space, dependent on either party's point of view. None of Haas' contracts with retailers lacks an exclusivity clause.

15. That the retailer may consider the area beyond its cash registers "dead" space, while Haas considers the same physical area to be "premium" space, is immaterial to the issues herein. Without the exclusivity right, there is nothing to prevent retailers from licensing one of Haas' competitors to install a wall rack above Haas' floor rack. Without the exclusivity clause, retailers could agree to put piles of a Haas' competitor's publications in its restrooms. Without the exclusivity clause, a retailer could let a competitor distribute publications by hand in the parking lots. None of these locations are other than "dead space" for the display of the

retailer's products, but excluding competitors from the entire property is essential to Haas' marketing plan.

16. Haas concedes that a portion of its contractual payments are for the right to use and occupy real property and that the use and occupancy portions of its contractual payments are taxable. On this basis, Haas has offered DOR a portion of the assessed tax. However, it is the fact that the two rights are separate, and separately defined in the contracts, that affects the instant case.

17. A review of the agreements between Haas and the various retailers reveals none in which the clauses providing for rack space and exclusivity are not separate and distinct. Some provisions are minimally different within the respective type of clause, but all are to the same effect that: In one contract clause, Haas acquires a right to physically place its racks in a described area of the retailer's stores, and in an entirely separate clause of the same contract, Haas acquires the competitive advantage of exclusivity for its publications at that retailer's locations.

18. At most, the differences in Haas' contracts amount to retailers who specify differences with regard to Haas' physical use of the retailer's real property, i.e. that racks will be located near exit doors instead of entrance doors, or that Haas will use an eight pocket-to-twelve pocket rack, as opposed to

some other size of rack, but there are no differences of any significance affecting the exclusivity clauses. If anything, these minor differences in the various contracts point up the narrow area of the real property location within the store that is being rented for Haas' racks and the breadth of the exclusivity agreement by which Haas pays for the right to exclude all competitors from the whole of the retailer's internal and external premises, and further point up that the two contract provisions are different and severable.

19. Haas paid for an exclusive right of occupancy and distribution in numerous locations throughout the United States and Florida, by entering into contracts with the following retail store chains: Seven-Eleven, Albertson's, Bally's, Blockbuster Video, CVS, Eckerd's, Harris Teeter, K-Mart, Polo's Videos, Sedanos, Suncoast Entertainment, Vero, and Winn Dixie. These contracts were not limited to locations within any single state but did involve Florida locations throughout many Florida regions and counties. (Stipulation 7)

20. Pursuant to Section 72.011(1)(b), Florida Statutes, Haas has complied with the applicable registration requirements with respect to the taxes at issue herein. (Stipulation 8)

21. DOR conducted an audit of Haas for the period of January 1, 2002, through December 31, 2004. The audit resulted in an assessment of sales and use tax and associated surtaxes,

interest, and penalties (Assessment). There were four separate audit adjustments underlying the assessment, which were listed by the auditor on schedules B01, B02, B03, and B04, of the audit report. Schedule B04, concerning tax on licenses to use real property, is the adjustment which gave rise to this controversy. The other adjustments (B01, B02, and B03) were later paid as uncontested, prior to the filing of this action.

(Stipulation 10)

22. In Schedule B04 of the audit report, DOR's auditor determined that tax should be assessed on the total amount which Haas had paid under its written agreements regarding its Florida locations. The auditor determined that such payments constituted taxable "rent" paid by Haas. The auditor further determined that tax should be imposed both on monthly rental payments and on "sign-on bonus" payments. (Stipulation 11)^{2/}

23. By an April 8, 2008, Notice of Reconsideration (NOR), DOR upheld the audit and resulting assessment in full. The total balance DOR determined to be due at that time was \$996,037.44, consisting of tax and interest. All assessed penalties were compromised or waived. (Stipulation 12g)

24. On June 6, 2008, Haas paid \$48,665.11, representing payment on all portions of the assessment which were uncontested at that time, pursuant to Section 120.80(14), Florida Statutes (2007). (Stipulation 12h)

25. On August 18, 2008, after the case had been filed at DOAH, DOR filed a Notice of Revised and Reduced Assessment With Stated Rationale (Revised and Reduced Assessment). The Revised and Reduced Assessment removed "sign-on" bonuses from consideration in the computation of the tax liability, though expressly stated that DOR continued to consider such payments to be taxable. (Stipulation 12j)

26. The Revised and Reduced Assessment sets forth the current assessment amount in controversy. It differs from the NOR only in the removal of "sign-on" bonuses from the tax computation. (Stipulation 12k)^{3/}

27. DOR has represented by its Notice of Filing in connection with the Revised and Reduced Assessment that the reduction made was not intended as a concession or admission that the "sign-on bonuses" were not taxable, but rather was intended to avoid or render moot any assertion that DOR was acting inconsistently with the prior decision in Haas 2003. (Stipulation 13)

28. In addition to the foregoing stipulations, the specific language of the Notice of Revised and Reduced Assessment is informative. It reads, in pertinent part, as follows:

Although the amount of the reduction was determined by removing from the assessment the tax assessed on Petitioner's payment of

sign-on "bonus payments," nothing in this reduction should be misconstrued as an admission or statement that bonus payments are not taxable, or as an admission or statement that any portion of the licensing agreement rental payments should be allocable to a non-taxable intangible, or that any non-taxable intangibles exist.

Rather, this relatively small reduction was made to render "moot" any argument that the Department is now acting inconsistent [sic] with its' prior Final Order (Haas 2003). The prior Final Order properly held that monthly rental payments are subject to tax but determined that sign-on bonus payments are not subject to tax, and this reduction now accomplishes that same effect.
(Material in parentheses added for clarity.)

29. DOR put on no evidence, and has cited no legal authority, permitting the Agency to ignore or fail to collect a tax it claims is legitimately owed by a taxpayer. The Notice of Revised and Reduced Assessment herein was not a stipulation in furtherance of litigation between the parties. It was a factual act/determination by DOR, whereby the Agency elected not to tax, for the instant audit period, a portion of Haas' contractual payments. DOR had previously determined, via the Final Order in Haas 2003, that signing bonuses were not taxable. Therefore, the Revised and Reduced Assessment herein corrected this case's auditor's initial determination, contrary to the only existing case law, that signing bonuses were taxable. In entering the Revised and Reduced Assessment in the instant case, DOR apportioned out of Haas' contractual payments for the instant

audit period the portion of the contractual payments allotted to signing bonuses, thereby establishing the same apportionment as had occurred in Haas 2003.

30. As of the date of the Joint Pre-hearing Stipulation, January 20, 2009, and throughout hearing on February 10-11, 2009, Haas agreed that it owes, in addition to the amount(s) it has already paid, an additional tax amounting to \$206,450.06, plus interest. At hearing, Haas presented its calculations of why Haas believes it owes that amount. (See all references to Haas' allocation methodology infra.) The parties are agreed that Haas did not ante-up that amount of cash prior to final hearing and that the failure to remit did not constitute a jurisdictional defect. However, DOR disagrees that Haas' allocation methodology should be utilized.

31. The record is silent as to the amount of interest which Haas would owe the State on the basis of the \$206,450.06, tax debt that Haas has conceded. Therefore, in the event DOR establishes a prima facie case, but Haas' "allocation methodology" is accepted herein, interest on the conceded amount of \$206,450.06, as well as the conceded \$206,450.06, tax debt itself, must be provided-for in the Recommendation.

32. On the other hand, in the event DOR establishes its prima facie case and Haas' "allocation methodology" is not

proven, the amount claimed by DOR, plus interest, would be the subject of the Recommendation.

33. The standard of a prima facie case for DOR is established at Section 120.80(14)(b)2., Florida Statutes (2007). Without a prima facie case, DOR cannot prevail on any theory.

34. DOR's only witness, the auditor-attorney who prepared the audit, testified that, partially in reliance on Homer v. Dadeland Shopping Center, Inc., 229 So. 2d 834 (Fla. 1970), he did not consider the allocation methodology submitted by Haas and did not allocate any of Haas' contractual payments to premises owners to "exclusivity rights," because Haas' contractual right to exclude Haas' competitors from placing their publications on the premises of the stores contracting with Haas equates with a restrictive covenant relating to real property deeds and is part of the "bundle of rights" traditionally associated with real property deeds and leases. Furthermore, DOR's auditor did not consider allocating such exclusivity rights because he felt that exclusivity rights do not amount to "intrinsically valuable personal property" as used in Section 212.031(1)(c), Florida Statutes. Upon this testimony, the Agency maintains that Haas owes taxes on all rent it has paid to retailers.

35. Ultimately, DOR's only witness, the auditor, did not comment on Haas' proposed allocation method's conceptual or

mathematical validity, and only opined that exclusivity rights could not be severed from real property for sales and use tax purposes under Section 212.031(1)(c), Florida Statutes.

36. Haas' proposed allocation methodology was presented at H03194 and H03166-H03193. (Stipulation 24)

37. Haas' proposed allocation methodology in the case at bar does not seek to attribute any value to logos, but only to exclusivity rights. (Stipulation 17)

38. Haas seeks only to subtract from the assessed tax that portion of Haas' payments made for exclusivity rights, as "intrinsically valuable personal property."

39. Haas challenges DOR's Revised and Reduced Assessment and maintains that it fails to correctly allocate between allegedly exempt and allegedly non-exempt contractual payments, but does not challenge the assessment on computational grounds. (Stipulation 18)

40. Haas has one or more competitors who distribute their own publications at retail store chains, but not at the retail store chains with which Haas contracts. (Stipulation 19)

41. Typically, Haas has to "outbid" at least one other competitor to obtain the various rights which are at issue. (Stipulation 20)

42. "In-market" areas are those geographical areas where Haas publishes magazines and places its own rack inside the

stores, whereas "outlying" areas are those geographical areas where Haas does not publish a magazine. (Stipulation 21)

43. In an "outlying" or "non-serviceable" area, Haas tries to find third parties who are willing to pay Haas to have their own advertising materials placed on racks pursuant to subleases. When Haas subleases to a third party, it does not pass on the right of exclusivity. (Stipulation 22)

44. Haas only sells advertisements in areas where it has publications. The advertisements, not the publications, are sold, and the contractual exclusivity of distribution locations spurs Haas' sales to its print advertisers. Advertising is the main source of Haas' revenue, and was 80-85 percent of Haas' total revenue during this audit period.

45. Despite an aggressive marketing plan and remarkable growth rate (nearing 20 per cent) since 1996, Haas' publications are published and circulated via its racks on retailers' premises only in certain communities and regions and not all communities and regions have a Haas publication. That does not mean that Haas does not hope, and seek, to expand into those currently un-served communities and regions.

46. All Haas' sales representatives are trained to emphasize Haas' exclusive distribution rights, obtained via the exclusivity clauses contained in Haas' contracts with the various retailers. They use "media kits" designed to emphasize

Haas' exclusive distribution rights. The exclusivity rights are Haas' "competitive edge" in what is a relatively new business sphere. Exclusivity rights allow Haas' sales personnel to represent to potential advertisers that anyone entering specific retail chains will see only Haas' publications. Thus, anyone entering those retail chains will see only the advertisements in Haas' publications and will not see any publications featuring the competitors of Haas' advertisers.

47. The exclusivity rights ensure "unique foot traffic" audiences or "exclusive" eyeballs on Haas publications and effectively "fence out" competitive publishers, publications, and distribution plans.

48. The element of exclusivity has permitted Haas to increase its rates, charge premium rates to client advertisers, charge higher rates than its competitors, and still increase its advertising sales volume throughout the audit period. According to Haas' employee-witnesses, exclusivity is the most important factor in Haas' ability to sell advertisements. Moreover, acquiring exclusivity rights from retailers has been the thrust of Haas' marketing plan.

49. Haas has never attempted to sell an exclusivity right to another publisher or publication distributor.

50. Haas' method of doing business is new, innovative, and possibly unique, but exclusivity is the key element which has

allowed Haas to dramatically increase its market share. There are no sales to other publishers with which to compare Haas' exclusivity rights. Exclusivity rights are something Haas wants to retain, so it is not unreasonable that Haas has not tested the market for sale of its exclusivity rights. However, the very facts that Haas has obtained exclusivity rights from retailers, via the contracts here at issue, and has transferred, via "pocket agreements," the right of placement to other publishers, without simultaneously transferring Haas' exclusivity rights, derived from the location owner (retailer), to those other publishers demonstrates that the rights of exclusivity and rental occupancy are severable, and that exclusivity is an intrinsically valuable personal property right.

51. Some locations, such as grocery stores, are more valuable to Haas advertisers than other locations, such as consumer service locations, because they move more publications per month.

52. While Haas would like to have its Guides published everywhere, a number of factors enter into the equation of where Haas will contract with retailers. Haas' senior management selects particular markets in which to publish and decides the timing for market entry.

53. The distinction between what Haas is willing to pay to "in-market" and "out-lying" stores currently may be \$500 or more per month. However, the payment of \$50, for a location in an outlying area versus the payment of \$500, or more for the same multi-outlet retailer's in-market store, provides Haas with the option for exclusive distribution in the outlying store if, and when, Haas moves into soliciting advertising, printing a publication, and distributing Haas' publication(s) in that outlying community or locale at some date in the future. Clearly, this benefit is an intangible. Haas submits that it is a non-taxable intangible, but does not seek to reduce the Revised and Reduced Assessment to account for any possible value of such option for a future competitive advantage. Rather, Haas' proposed allocation formula attempts to measure only the value of exclusivity in the in-market area where Haas has a current competitive advantage.

54. Under Haas' contracts, Haas pays one fee for "in-market" and one fee for "outlying" stores of the same retailer. If Haas ever exercises the option of developing a publication in a formerly outlying area, the area becomes "in-market" and the fee is the higher "in-market" fee.

55. In outlying areas, Haas' exclusivity does not provide the same competitive advantage as it does for in-market stores, but Haas may sublease its racks to existing publications in that

area, without passing on the right of exclusivity. Usually, Haas' income from the sublease only covers the amount Haas is already paying the outlying area retailer for that location. Haas never passes on the right of exclusivity to any third party.

56. The physical location of the retail stores, aside from being in-market or in an outlying area, is immaterial to Haas and does not enter into Haas' allocation formula.

57. Kim Payne, Haas' Director of Financial Analysis, analyzed the relative costs and benefits of the contracts at issue. She segregated the type(s) of retailers into five categories corresponding to the categories of "book movement" as assessed by Haas. (These categories are quite technical but roughly correspond to speed and quantity of sales, and vary by in-market and outlying area.) She allotted amounts to physical rent and exclusivity and calculated a taxable and non-taxable percentage. For contracts without separately negotiated in-market and outlying payment, she used the applicable book movement categories from similar retailers with separately negotiated in-market and outlying payments, each time choosing a conservative option. She eliminated at least one retailer's non-taxable percentage due to that retailer's minimal presence in Florida during the audit period, and she did not apply the non-taxable percentages for either Jacksonville (an outlying

area) or Pensacola (an insignificant in-market area). Each of the adjustments, of which the foregoing are just examples, amounted to resolving a variable in favor of paying a higher tax. Through this allocation analysis, Ms. Payne arrived at Haas' request for a reduction of \$440,258.07, from the tax set forth in the Revised Assessment.

58. Curtis Kimball was accepted, over objection, as an expert witness in the valuation and recognition of intangible assets. Mr. Kimball analyzes and values businesses, business interests, intellectual property, and intangible assets, and does forensic and investment analysis of business assets, including fractional interests in real estate. Among his many qualifications, he is an accredited senior appraiser in the business valuation and intangible assets group of the American Society of Appraisers (ASA) and has served on its Board of Examiners. Although Mr. Kimball's field is the valuation of intangibles, and not real estate, he consulted a real estate appraiser as part of his preparation for forming the expert opinion he expressed at hearing. His opinion was rendered in accord with the Uniform Standards of Professional Appraisal Practice (USPAP), promulgated by the Appraisal Foundation and the American Society of Appraisers. He determined that Haas' methodology employed in the preparation of its allocation analysis is an appropriate and sound approach to measure the

value of intrinsically valuable personal property (the competitive advantage of exclusivity); that Haas' calculations were consistent and mathematically correct, and that Haas' allocation formula and amount was an appropriate allocation approach as he understood the dichotomy between the right of exclusivity and the right of rack placement.

59. Mr. Kimball further opined that the competitive advantage that flows from exclusivity is intrinsically valuable personal property, because it relates to Haas' revenue-generating abilities. It is analogous to the advantage of a holder of a patent, a franchise, a trademark, a service mark, or a logo, although it does not constitute a patent, franchise, trademark, or logo. In his experience, trademarks, service marks, logos, and patents are not necessarily "registered" and franchises typically are not registered. Therefore, the fact that no government entity "registers" exclusivity clauses is immaterial to comparing Haas' exclusivity rights with those examples used in the statute in dispute. Mr. Kimball believed that if Haas were to sell its assets, Haas' intangible contractual assets would have to be independently valued for federal income tax purposes. These are all indicia of intrinsically valuable personal property.

60. DOR's Auditor Wallace's testimony was limited to the Agency's position that Haas' exclusivity rights are part of the

bundle of rights of a real property deed, like the right of quiet enjoyment. Mr. Wallace did not testify to the substance of Haas' proposed allocation between taxable and nontaxable payments. Therefore, Haas' allocation formula and calculations were in no way discredited. Mr. Wallace also conceded that if the right of exclusivity had been found to be intrinsically valuable personal property, then under the statute, some allocation would be necessary.

CONCLUSIONS OF LAW

61. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause, pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2008).

62. Under the 2008, Florida Statutes, DOR need only do the following to prove a prima facie case:

Section 120.80(14) DEPARTMENT OF REVENUE.-

* * *

(b) Taxpayer contest proceedings.-

2. In any such administrative proceeding, the applicable 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 applicable department made the assessment.

63. The tax statute at issue herein reads as follows:

**Section 212.031(1) Lease or rental of or
license in real property—**

* * *

(c) For the exercise of such privilege, a tax is levied in an amount equal to 6 percent of and on the total rent or license fee charged for such real property by the person charging or collecting the rental or license fee. The total rent or license fee charged for such real property shall include payments for the granting of a privilege to use or occupy real property for any purpose and shall include base rent, percentage rents, or similar charges. Such charges shall be included in the total rent or license fee subject to tax under this section whether or not they can be attributed to the ability of the lessor's or licensor's property as used or operated to attract customers. Payments for intrinsically valuable personal property such as franchises, trademarks, service marks, logos, or patents are not subject to tax under this section. In the case of a contractual arrangement that provides for both payments taxable as total rent or license fee and payments not subject to tax, the tax shall be based on a reasonable allocation of such payments and shall not apply to that portion which is for the nontaxable payments. (Emphasis supplied)

64. The Recommended Order in Haas 2003, upheld DOR's sales and use tax assessment against this same taxpayer. That tax assessment had allocated signing bonus payments made pursuant to the agreements between Haas and various retailers to the non-taxable right of exclusivity but taxed the full amount of each of Haas' regular monthly payments to retailers without any

allocation to such right of exclusivity. The Recommended Order therein recognized that while DOR's allocation of signing bonuses may not have captured all elements of exclusivity, the taxpayer had failed to provide a credible alternative. The Final Order in that case adopted the Recommended Order in toto, in effect agreeing that DOR had not taxed the signing bonuses because they were attributed to the intangible right of exclusivity. See Haas Publishing Companies v. Department of Revenue, DOAH Case No. 03-2683 (RO: 6/18/04; Adopted in toto, FO: 11/9/04).

65. In the instant case, the auditor did not initially remove signing bonuses from a "res" or "bundle of rights," that was being taxed as rental of real property. Rather, this removal was done after formal litigation had begun. DOR's current position, via the Revised and Reduced Assessment herein, is quoted extensively at Finding of Fact 28. Despite an artfully crafted excuse, the result today is the same as it was in 2003: DOR has "apportioned out" signing bonuses. In doing so, DOR has conformed to the precedent enunciated in Haas 2003, when DOR's Final Order approved the Recommended Order in toto.

66. By its Revised and Reduced Assessment herein, DOR has formally agreed to treat one part of Haas' "bundle of rights" under Haas' agreements with a variety of retailers as "intrinsically valuable personal property," or DOR has formally

declined to apply Florida's sales and use tax to a real property right which DOR believes the Agency has an obligation to collect on behalf of the people of the State of Florida.

67. If, without any legal authority to do so, DOR has abrogated its obligation to collect a legitimate tax on signing bonuses, then it also must be concluded that DOR has not established a prima facie case "showing that an assessment has been made against the taxpayer and the factual and legal grounds upon which [DOR] made the assessment." See § 120.80 (14) (b), Fla. Stat. (2008). Ergo, absent a prima facie case, DOR cannot even collect the \$206,450.06, offered by the taxpayer under the taxpayer's proposed apportionment formula.

68. However, assuming that DOR acted consistently, albeit late, with the prior decision in Haas 2003, when its Revised and Reduced Assessment apportioned out the signing bonuses, then DOR has made a prima facie case on all fours with Haas 2003, and the way is clear to assess whether Haas' apportionment formula based on the exclusivity clauses, as presented in this case, unlike the formula based on real property values which Haas presented in the prior case, is appropriate. Given the low statutory threshold to establish a prima facie tax assessment case, this seems the more reasonable interpretation of events and evidence herein.

69. That said, the cogent, qualified, and unrefuted expert analysis and opinion of Mr. Kimball is persuasive that DOR just did not go far enough in apportioning out the exclusivity factor as calculated by Ms. Kimball, and that the taxpayer's apportionment formula is factually and legally appropriate under the circumstances of this case.

RECOMMENDATION

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

RECOMMENDED that the Department of Revenue enter a Final Order requiring Petitioner to pay \$206,450.06, in tax, together with any interest on that amount, not previously waived, and dismissing all remaining claims against Petitioner for the specified audit period.

DONE AND ENTERED this 20th day of August, 2009, in Tallahassee, Leon County, Florida.



ELLA JANE P. DAVIS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of August, 2009.

ENDNOTES

1/ See TR-521-523.

2/ In Haas 2003, the auditor removed the sign-on bonuses from consideration, thereby initiating an apportionment of that portion of the payments by Haas to retailers. That did not happen in the instant case. (See Findings of Fact 25-29.)

3/ "Fact" Stipulations 12 (a-f, and i) are redundant, unnecessary and/or subordinate to the Preliminary Statement and Findings of Fact, but they read as follows:

12. The procedural history of the audit and assessment is as follows:

a. A Notice of Intent to Make Audit Changes (also called an NOI) was dated January 19, 2006.

b. On February 14, 2006, the parties entered into an agreement extending the time wherein the Department could issue an assessment of tax. The agreement extended the Department's deadline to issue a Notice of Proposed Assessment through and including December 31, 2006.

c. The Notice of Proposed Assessment (NOPA) was timely issued September 28, 2006. DOR considers this document to be the completion of the audit.

d. After the audit was completed, a timely protest was submitted to DOR's Technical Assistance and Dispute Resolution (TADR), a dispute resolution process.

e. A Notice of Decision (NOD) was entered on October 1, 2007, sustaining the assessment in full.

f. Haas timely petitioned for reconsideration, wherein it made additional legal argument and presented additional facts, including a proposed allocation.

* * *

i. A petition for formal administrative hearing, seeking to challenge the NOR, was timely filed on July 17, 2008, and an Administrative Law Judge was assigned.

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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.