

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
JACKSONVILLE DIVISION

In re:

CASE NO.: 04-12723-3F1

SOUTH STREET TAVERN & GRILL, INC.

Debtor.

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**ORDER OVERRULING DEBTOR'S  
OBJECTION TO CLAIM 3 OF STATE OF  
FLORIDA, DEPARTMENT OF REVENUE**

This case came before the Court upon Debtor's Objection to Claim 3 (the "Objection") of State of Florida, Department of Revenue ("DOR") and DOR's Response to Objection to Claim 3 (the "Response"). The Court conducted a hearing on March 9, 2006 (the "Hearing"). Debtor and DOR presented testimony of one witness and offered exhibits into evidence. Upon representations by counsel at the Hearing and a review of the Objection and the Response, the Court finds it appropriate to overrule Debtor's Objection.

Florida Statute § 212.031 (2005) levies a tax on "every person . . . who engages in the business of renting, leasing, letting, or granting a license for the use of any real property . . . ." F.S. § 212.031(1)(a) (2005). In essence, the "purpose of Section 212.031 is to levy a tax upon the privilege of engaging in the business of renting real property." Lord Chumley's of Stuart, Inc. v. Dep't of Revenue, State of Florida, 401 So. 2d 817, 819 (4th DCA 1981). In determining the applicability of § 212.031, a court must find that the "preponderance of the evidence demonstrates that the character of the relationship between [the two entities] is . . . that of a landlord and tenant." Solano v. Dep't of Revenue, 2004 WL 542730, at \*7 (Fla. Div. Admin. Hrgs. March 17, 2004).

The Court has determined that the facts of this case are similar to those of Regal Kitchens, Inc. v. Florida Dep't of Revenue, 641 So. 2d 158 (1st DCA 1994). In Regal Kitchens, a general partnership owned real property on which a corporation conducted its business. Regal Kitchens, 641 So. 2d at 161. Both the corporation and the general partnership were owned by the same four principals. Id. The corporation at one time owned the real property subject to a mortgage, but decided to sell the property to the general partnership and lease it back. Id. Under the "lease," the corporation paid monthly

rent to the general partnership, which then applied such rental income to pay the mortgages, insurance and taxes burdening the property. Id. At issue before the First District Court of Appeal was whether this arrangement was subject to the tax imposed pursuant to F.S. §212.031. Id. at 162. The court held that despite the relationship of the two entities, the general partnership was nevertheless engaged in the business of leasing property. Id.

The court reasoned that the "stockholders of [the corporation] would not have titled the property in the name of the partnership and leased it back unless there was some benefit inherent in that arrangement." Id. at 163. In addition, the two entities could not be regarded as "alter egos" of each other because a corporation cannot pierce its own corporate veil in order to avoid paying taxes. Id. "Those who seek the protection afforded by incorporation must also accept the burdens. Individuals may incorporate to shield themselves from personal liability . . . but they may not then disavow the existence of the corporation for the purpose of obtaining a tax advantage." Id. Thus, the First District ruled that one entity paying rent to a separate entity must pay taxes pursuant to F.S. §212.031, no matter the interrelatedness of the entities. Id.

The Court agrees with this rationale, and finds the rule from Regal Kitchens applicable to the case at hand. Debtor is a corporation which is utilizing property owned by Sotav, Ltd. ("Sotav"), a limited partnership. It is of little import that Debtor claims the two entities are essentially the same, since the same family members have ownership in each entity. What matters is that the family decided to create two separate entities: one entity to own the property, the other entity to operate the business. This decision reflects some inherent benefit to the parties involved. See Regal Kitchens, 641 So. 2d at 163. Furthermore, the Court finds that Debtor cannot now "disavow the existence of the corporation for the purpose of obtaining a tax advantage." Id. Thus, the Court finds that the mortgage payments by Debtor for property owned by the limited partnership constituted rent for real property, and is taxable under F.S. §212.031.

The Court notes the case of Lord Chumley's of Stuart, Inc. v. Dep't of Revenue, 401 So. 2d 817 (4th DCA 1981). In that case an individual held title to real property as trustee for the benefit of four corporations, which the individual owned. Id. at 818. The distinction of that case is that the "character of the relationship between the owner of the land and

the operator of the business of the land was not that of a landlord and tenant.” Regal Kitchens, 641 So. 2d at 163. Regal Kitchens, however, focused on the relationship between a partnership and a corporation, “where there is recognized a separation of legal rights sufficient to give rise to two or more distinguishable entities.” A.D.E. of Panama City, Inc. v. Dep’t of Revenue, 2001 WL 332971, at \*7 (Fla. Div. Admin. Hrgs. April 2, 2001). The Court finds that based on the creation of two separate entities, the preponderance of the evidence proves that the nature of the relationship between Debtor and Sotav was that of landlord and tenant. Solano, 2004 WL 542730, at \*7.<sup>1</sup>

Even if the Court could be persuaded to find that Debtor and Sotav were basically only one entity in two forms, the Court finds that judicial estoppel precludes Debtor from claiming that there is no lease agreement between it and Sotav. “Judicial estoppel is applied to the calculated assertion of divergent sworn positions . . . and is designed to prevent parties from making a mockery of justice by inconsistent pleadings.” In re Pittman, 289 B.R. 448, 451 (Bankr. M.D. Fla. 2003)(quoting Am. Nat’l Bank v. FDIC, 710 F.2d 1528, 1536 (11th Cir. 1983)). In Sotav’s Schedules, it listed an “unwritten month to month lease with South Street Tavern & Grill, Inc.” as personal property (Sotav’s Schedules, Schedule B. Personal Property at ¶ 22), and listed “South Street Tavern” as the “lessor of [a] month to month lease” (Sotav’s Schedules, Schedule G. Executory Contracts and Unexpired Leases). These same assertions are conspicuously absent in Debtor’s Schedules. The Court finds that these inconsistent positions amount to an “intentional contradiction in order to obtain an unfair advantage.” Pittman, 289 B.R. at 452.

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<sup>1</sup> It is based on this rationale that the Court rejects Debtor’s argument that the relationship between Debtor and Sotav was that of a joint venture. While there must be a legal relationship between the two parties consonant with that of a contract, there must also be “joint control or right of control, . . . a right to share in the profits and . . . a duty to share in any losses . . . .” Kislak v. Kreedian, 95 So. 2d 510, 515 (Fla. 1957)(citation omitted). Most importantly, the Court finds that there is a clear lack of evidence of any contractual arrangement between Debtor and Sotav besides the agreement to rent the real property. Moreover, the Court also notes that from the evidence there is no indication that Sotav shared in the operating losses of Debtor, or that Sotav was entitled to dividends from Debtor. In fact, Debtor’s schedules do not even list Sotav as owning any stock in Debtor. (Debtor’s Schedules, Form 7. Statement of Financial Affairs at ¶ 21.)

Because Debtor and Sotav are two separate entities, the Court holds that the mortgage payments made by Debtor for the property owned by Sotav constituted rent and are taxable under F.S. §212.031. In addition, the Court holds that judicial estoppel precludes Debtor from asserting that Debtor did not enter into a lease agreement with Sotav. Based upon the forgoing, it is

**ORDERED:**

1. Debtor’s Objection to Claim 3 of State of Florida, Department of Revenue is overruled.

2. Debtor shall be liable to the State of Florida, Department of Revenue for a sales tax of 6% on the monthly mortgage payment paid by Debtor during the duration of the lease.

**DATED** this 28 day of March, 2006 in Jacksonville, Florida.

/s/ Jerry A. Funk

**JERRY A. FUNK**

United States Bankruptcy Judge

**Copies furnished to:**

Bryan K. Mickler, Attorney for South Street Tavern & Grill, Inc.

Frederick F. Rudzick, Attorney for State of Florida, Department of Revenue

Miriam G. Suarez, United States Trustee