NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
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IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

VMOB, LLC d/b/a CHEAP ON HOWARD and VERNA BARTLETT, Appellants, v. DEPARTMENT OF REVENUE, Appellee.	)	Case No. 2D18-2723

Opinion filed February 19, 2020.

Appeal from the Department of Revenue.

W. Bart Meacham, Tampa, for Appellants.

Ashley Moody, Attorney General, and Mark S. Urban, Assistant Attorney General, Tallahassee, for Appellee.

SALARIO, Judge.

This appeal arises from a Tampa business's failure to make sales tax payments to the Department of Revenue as required by chapter 212, Florida Statutes (2015). VMOB, LLC d/b/a Cheap on Howard and Verna Bartlett challenge a final agency order revoking VMOB's certificate of registration, sustaining jeopardy findings and notices of final assessment, and sustaining a personal liability assessment against Ms. Bartlett in the amount of $81,060.04. We affirm the final order without comment

insofar as it revoked VMOB's certificate of registration and sustained the Department's jeopardy findings and assessment notices. We reverse the final order insofar as it sustains the personal liability assessment, however, because the amount sustained exceeds the amount allowable under the governing statute.

Section 213.29, Florida Statutes (2015), authorizes a penalty—which the Department calls a personal liability assessment—against certain corporate officers or directors who assist a corporation in evading or defeating payment of certain taxes, including sales taxes under chapter 212. The statute provides that:

> Any person who is required to collect, truthfully account for, and pay over any tax enumerated in chapter 201, chapter 206, or chapter 212 and who willfully fails to collect such tax or truthfully account for and pay over such tax or willfully attempts in any manner to evade or defeat such tax or the payment thereof; or any officer or director of a corporation who has administrative control over the collection and payment of such tax and who willfully directs any employee of the corporation to fail to collect or pay over, evade, defeat, or truthfully account for such tax shall, in addition to other penalties provided by law, be liable to a penalty equal to twice the total amount of the tax evaded or not accounted for or paid over. The filing of a protest based upon doubt as to liability or collection of a tax shall not be determined to be an attempt to evade tax under this section. The penalty imposed hereunder shall be in addition to any other penalty imposed or that should have been imposed under the revenue laws of this state, but shall be abated to the extent that the tax is paid. Any penalty may be compromised by the executive director of the Department of Revenue as set forth in s. 213.21. An assessment of penalty made pursuant to this section shall be deemed prima facie correct in any judicial or quasi-judicial proceeding brought to collect this penalty.

§ 213.29 (emphasis added). In sum, and as relevant here, the statute provides for a penalty (1) against any officer or director of a corporation with administrative control over the collection and payment of sales taxes who willfully directs any employee to fail

to collect or pay over or to evade, defeat, or account for sales taxes; (2) in an amount equal to twice the amount of the tax; and (3) that is to be "abated to the extent that the tax is paid."

On January 9, 2017, the Department issued a notice of personal liability assessment against Ms. Bartlett in which it stated, consistent with section 213.29, that she was "a corporate officer or director with administrative control" over VMOB's payment of sale and use tax and that she had engaged in prohibited conduct for which a penalty could be imposed under section 213.29. The notice identified tax payments that were due but not made on dates between July 1, 2015 and October 31, 2016 and stated that the total amount of those unpaid taxes was $40,530.02, resulting in a penalty for which Ms. Bartlett was personally liable of $81,060.04—double the amount of those taxes. The notice informed Ms. Bartlett of her right to request a hearing, which she exercised.

Ms. Bartlett's request for a hearing, together with certain other matters with which it was consolidated, was referred to the Department of Administrative Hearings (DOAH). While the matter was pending at DOAH, VMOB paid substantially all of the outstanding taxes that were the subject of the personal liability assessment. By the time the matter went to a hearing before an administrative law judge (ALJ), only $8790.56 of the original total of $40,530.02 in unpaid tax was outstanding. In addition to disputing other aspects of the Department's case, Ms. Bartlett argued that the penalty the Department assessed could not exceed $17,581.12—double the $8790.56 not yet paid by VMOB.

The ALJ held an evidentiary hearing during which two witnesses testified and several documents were received into evidence. The ALJ issued a recommended

order in which it found (1) that "Ms. Bartlett had administrative control over VMOB and was personally responsible for collecting VMOB's sales tax and remitting it to the Department," (2) that Ms. Bartlett willfully failed to submit a payment with respect to some sales taxes and willfully submitted worthless checks on behalf of VMOB for others, and (3) that the amount of the unpaid tax was $40,530.02. The ALJ concluded that the imposition of a penalty of double the amount of the unpaid tax was proper, rejected Ms. Bartlett's argument that the penalty could not exceed $17,581.12, and recommended that the Department enter a final order imposing a personal liability assessment against Ms. Bartlett in the amount of $81,060.04—double the $40,530.02 amount that was not paid when due and that was identified in the Department's notice.

VMOB and Ms. Bartlett filed exceptions to the recommended order which stated, as relevant here, that the ALJ erred in determining the amount of the personal liability assessment against Ms. Bartlett because VMOB substantially paid the taxes that were the subject of the personal liability assessment. The Department rejected that exception and rendered a final order in which it adopted the ALJ's findings of fact and conclusions of law and sustained the imposition of a $81,060.04 personal liability assessment against Ms. Bartlett. We now have a timely appeal from that order.

Ms. Bartlett does not raise any appellate issue with respect to the factual findings underlying the final order as it pertains to the personal liability assessment. Nor does she challenge the final order's determination that a personal liability assessment against her is legally proper.[1] The only issue with respect to the personal liability

[1]Ms. Bartlett's declination to challenge the factual or legal bona fides of the imposition of a personal liability assessment means that we need not address two matters about which the reader might be curious. See I.R.C. v. State, 968 So. 2d 583, 588 (Fla. 2d DCA 2007) ("[A] reviewing court [will] ordinarily reverse only on the basis of

assessment she raises is whether the Department erred by sustaining an assessment that exceeds the amount allowable under section 213.29. Based on the unambiguous language of that statute, we agree with Ms. Bartlett—at least in part.

We are presented with a question of statutory construction—whether section 213.29 allows the Department to sustain a penalty against Ms. Bartlett in the amount it did here.[2] The rules we apply to answer that question are familiar. We begin with the text of the statute we are called upon to interpret, see Diamond Aircraft Indus., Inc. v. Horowitch, 107 So. 3d 362, 367 (Fla. 2013), and we give statutory terms their

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the specific arguments presented by the appellant."). The first is whether section 213.29's provision authorizing a penalty against an "officer or director of a corporation" applies here in light of the fact that VMOB appears to be a limited liability company, not a corporation. (Emphasis added.) The second is whether the factual findings that Ms. Bartlett individually failed to pay VMOB's taxes and passed bad checks as purported payment for some of those taxes is sufficient to sustain a penalty in light of section 213.29's language that the penalty applies to a corporate officer or director "who willfully directs any employee" to not pay or evade the tax, not who herself fails to pay or evades the tax. (Emphasis added.) Our opinion should not be understood as expressing a view on either question.

[2]The parties have not addressed the standards by which we evaluate the Department's resolution of this question. In general, we may set aside a final order of an agency like the Department where "[t]he agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action." § 120.68(7)(d), Fla. Stat. (2017). Under the law at the time this appeal was filed, there might have been an argument to afford deference to the Department's construction of the statute because it is one the Department is charged with administering. See, e.g., Murciano v. State, 208 So. 3d 130, 134 (Fla. 3d DCA 2016). While this appeal was pending, however, the people adopted article V, section 21 of the Florida Constitution, which requires that we give no deference to agency interpretations of statutes. We need not address how article V, section 21 applies to cases pending before its adoption because, even under previous law, we would not defer to an agency interpretation that is contrary to the unambiguous language of a statute. See Murciano, 208 So. 3d at 134 (articulating the de novo standard to be applied to a question of law in reviewing with deference an agency's interpretation of a statute and recognizing that such deference does not extend to a "clearly erroneous interpretations of a statute" (quoting Bethesda Healthcare Sys., Inc. v. Agency for Heath Care Admin., 945 So. 2d 574, 576 (Fla. 4th DCA 2006))); see also McKenzie Check Advance of Fla., LLC v. Betts, 928 So. 2d 1204, 1215-16 (Fla. 2006) (Cantero, J., concurring in part and dissenting in part).

ordinary meaning unless the legislature has defined them or the context indicates that they have a specialized or technical meaning, see State v. Kwitowski, 250 So. 3d 210, 214-15 (Fla. 2d DCA 2018). If the statute is not ambiguous, its unambiguous meaning is dispositive and resolves the case. See Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984). If the statue is ambiguous in the sense that a reasonable person could understand it as meaning two or more different things, however, we turn to other aids to construction. See English v. State, 191 So. 3d 448, 450 (Fla. 2016); Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So. 2d 452, 455 (Fla. 1992).

The parties have not directed us to any precedents interpreting section 213.29 in circumstances where, as here, the delinquent taxes have been repaid in whole or part after a penalty has been assessed, and we have found none ourselves. The relevant statutory language and its application to this case is, however, quite straightforward.

The Department's legal conclusion that section 213.29 authorizes a penalty of $81,061.04—double the amount of VMOB's outstanding taxes at the time of the notice of personal liability assessment was issued—falters on the statute's unambiguous command that a penalty assessed pursuant to the statute "shall be abated to the extent that the tax is paid." When talking about a monetary liability like a penalty as section 213.29 does, to say that the liability shall be abated is commonly understood as saying that it shall be reduced or eliminated to some extent. See *Abate*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/abate (last visited Jan. 4, 2020) (defining "abate" to mean, inter alia, "to reduce in value or amount," "to make less," and "deduct, omit"); *Abatement*, Black's Law Dictionary (10th ed. 2009) (defining abate to mean, inter alia, "the act of lessening or moderating; diminution in

amount or degree"); cf. In re Estate of Potter, 469 So. 2d 957, 959 (Fla. 4th DCA 1985) (quoting Redfearn, Wills and Administration in Florida § 12.08 (5th ed. 1977), for a discussion on the abatement of a general devise in a will). And the statutory phrase "to the extent that" is the rough equivalent of saying "insofar as" or "to the degree that." See *Extent*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/extent (last visited Jan. 7, 2020) (defining "extent" to mean, inter alia "the point, degree, or limit to which something extends"). To say, for example, that one's mortgage debt will be abated to the extent of his or her payments is to say that the debt will be reduced by the amount in which it is paid. Cf. Hendricks v. Stark, 126 So. 293, 297 (Fla. 1930) (describing an abatement of the balance due on a mortgage after a partial failure of consideration). And similarly, to say that the penalty imposed pursuant to section 213.29 "shall be abated to the extent the tax is paid" is to say that the amount of the penalty shall be reduced by whatever amount of the tax upon which the penalty is based has been paid.[3]

In this case, the Department assessed a penalty of $81,060.04 against Ms. Bartlett based on VMOB's failure to pay the total of $40,530.02 of sales taxes as they came due. Our record discloses that VMOB has paid $31,779.06 of the sales-tax amount upon which the penalty assessed against Ms. Bartlett was based, leaving a balance of $8750.96. Under the plain meaning of the abatement provision, then, the Department should have reduced the $81,060.04 penalty assessed against Ms. Bartlett

[3]The Department's final order and its brief here both assert that the penalty provided in section 213.29 may be abated only when the tax upon which the penalty is based has been paid in full. But the Department identifies nothing in the ordinary meaning of the statutory phrase "shall be abated to the extent the tax is paid" that supports its reading of the statute.

by the $31,779.06 VMOB paid before the hearing at DOAH. Once that reduction is made, the proper amount of the penalty against Ms. Bartlett under section 213.29 is $49,280.98. Thus, we agree with Ms. Bartlett that the penalty the Department's final order sustained exceeds the amount of the penalty allowable under section 213.29.

However, Ms. Bartlett's further assertion that the allowable penalty is limited to $17,581.12—double the $8790.56 not paid by VMOB at the time of the hearing—is not supported by a reasonable reading of the statutory text. Ms. Bartlett first argues that the statutory provision that the penalty shall be "equal to twice the total amount of the tax evaded or not accounted for or paid over" means that because VMOB ultimately paid most of the tax—albeit many months late—the penalty can only be double the amount it had not paid at the time of the hearing. In Ms. Bartlett's view, then, as long as some tax is ultimately paid over, however late, the penalty cannot exceed twice the outstanding balance. But section 213.29 imposes a penalty for the willful failure to "pay over" a tax and for willful attempts to "evade" or "defeat" a tax. That language reasonably expresses a legislative decision to impose a penalty for the willful dodging of a tax liability when that liability is due. Cf. Farhud v. Clark, 399 So. 2d 1079, 1081 (Fla. 1st DCA 1981) (holding that the statute of limitations for evasion of payment of sales tax begins to run when the tax is due). It does not reasonably express a legislative decision to forego or limit the imposition of a penalty so long as some day, no matter how long after the tax was due, the tax is paid in some amount.

On the contrary, section 213.29 explicitly addresses subsequent payment of a willfully withheld or evaded tax obligation through its abatement provision, which provides that "[t]he penalty imposed hereunder . . . shall be abated to the extent the tax is paid." If Ms. Bartlett's interpretation of that part of the statute defining the amount of

the penalty as twice the tax not "paid over" is correct, then this abatement provision is useless. Under Ms. Bartlett's reading, the penalty itself would reflect any payment of the tax upon which it is based made at any time, regardless of when the tax was due and regardless of whether it was willfully withheld. That leaves the abatement provision with no work of its own to perform because any reduction of the penalty the abatement provision could offer was already factored into the computation of the penalty as an initial matter. It is not reasonable to read statutory text in a way that renders other text in the same statute without meaning or effect. See State v. Bodden, 877 So. 2d 680, 686 (Fla. 2004) ("[W]ords in a statute are not to be construed as superfluous if a reasonable construction exists that gives effect to all words."); Zivitz v. Zivitz, 16 So. 3d 841, 847 (Fla. 2d DCA 2009) (rejecting reading of a statute that rendered other parts of the same statute meaningless). We decline to do so here.

Ms. Bartlett also argues that the abatement provision requires that the penalty be reduced to twice the amount of the tax unpaid at the time of the hearing. That argument confuses the statutory terms "penalty" and "tax" in the abatement provision. The "penalty" to which the abatement provision refers is, quite obviously, the penalty established earlier in section 213.29—double the tax that was not paid when it was due. The "tax" is the tax that was not paid when it was due and is the subject of the penalty—the thing that has been doubled. The abatement provision thus operates to reduce the larger figure (the penalty) by the smaller one (the payment of the tax). That is accomplished in this case by reducing the penalty of $81,060.04 by the $31,779.06 in tax paid after the penalty's imposition. Ms. Bartlett's reading of the abatement provision treats the penalty as being the same amount as the tax and

attempts to create a penalty that is the original $40,530.02 of undoubled, unpaid tax and reduce it by $31,779.06. That is simply not what the statutory language here does.[4]

For the foregoing reasons, we reverse that part of the Department's final order sustaining a personal liability assessment against Ms. Bartlett in the amount of $81,060.04 because it is inconsistent with the terms of section 213.29. Although it appears that the correct penalty on these facts is $49,280.98, we acknowledge the possibility that there may have been additional tax payments by VMOB while this appeal has been pending. We therefore remand for reconsideration of the portion of the order sustaining the amount of personal liability assessment and recalculation of that amount in keeping with the statute. In all other respects, the Department's final order is affirmed.

Affirmed in part; reversed in part; remanded.

VILLANTI and ROTHSTEIN-YOUAKIM, JJ., Concur.

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[4]Ms. Bartlett has not argued that interpreting the abatement provision in accord with its unambiguous terms is absurd or clearly contrary to legislative intent. See State v. Hackley, 95 So. 3d 92, 95 (Fla. 2012) (discussing the absurdity doctrine). Nor has she argued that this interpretation of the statute poses any constitutional problem.