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IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FIRST DISTRICT

CASE NO: 1D14-3966
DOR 2014-002 FOF

RHINEHART EQUIPMENT CO.,

Appellant,

v.

FLORIDA DEPARTMENT OF REVENUE,

Appellee.

ANSWER BRIEF OF RESPONDENT-APPELLEE FLORIDA DEPARTMENT OF REVENUE

On Appeal From a Final Order Issued by
Florida Department of Revenue

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STATEMENT OF THE CASE AND FACTS

The facts in this case are not in dispute; however, Appellant's recitation does not contain all the facts, adds emphasis not found in the original, and contains some argument. For purposes of clarity, the stipulated facts, as they appeared in the record below are restated in paragraph nos. 1-19. (R. Vol. III, pgs. 405-410).

1. Rhinehart Equipment Co. ("Rhinehart") is a retail heavy equipment dealer located in Rome, Georgia and does not own or maintain a showroom or office space location in Florida or directly provide financing to any Florida resident for any of its sales.

2. Rhinehart does not provide Florida customers with any after sale services such as assembly, technical advice, or maintenance. Rhinehart does not have any employees residing in Florida.

3. In early March, 2005, to the Florida Department of Revenue ("DOR") received an anonymous tip pursuant to Section 213.30, Florida Statute[s].

4. The caller alleged that Rhinehart was: selling equipment to Florida residents without including sales and use tax in the sales price; delivering the equipment to Florida customers using its own trucks; and advertising in a commercial publication *Heavy Equipment Trader*, Florida edition.

5. Rhinehart advertised with the Trader Publishing Company which is distributed in Georgia, Alabama, Florida, and Tennessee.

6. By letter dated March 31, 2005, DOR contacted Rhinehart and advised that its business activities may be such as to require Rhinehart to register as a "dealer" for sales and use tax and may be subject to file corporate income tax returns as well as other taxes.

7. On May 2, 2005, Rhinehart, without counsel, responded to DOR's inquiry, and by application effective July 1, 2005, registered to collect and/or report sales and use tax to the State of Florida.

8. On June 8, 2005, DOR asked Rhinehart to self-disclose any tax liability that it may have incurred during the three year period prior to its registration effective date (July 1, 2002 through June 30, 2005).

9. In response, on August 8, 2005, Rhinehart, through counsel, sent a letter requesting a meeting or conference call to discuss DOR's June 8, 2005 request due to certain legal issues regarding nexus.

10. Rhinehart began filing the required tax returns relating to its Florida sales, noting in writing by cover letter that the returns were being filed "under protest," and began collecting and remitting sales and use tax starting in July 2005. Rhinehart declined to provide any information regarding sales made prior to July 1, 2005.

11. On September 30, 2005, Rhinehart's counsel sent via Federal Express, a detailed protest letter to the DOR and advised that: (1) the DOR had not

established "substantial nexus" with Florida as interpreted under the Commerce Clause of the United States Constitution; and (2) Rhinehart was not required to register as a Florida dealer for sales and use tax purposes.

12. On May 23, 2008, the DOR issued a Notice of Intent To make an Assessment, and on September 11, 2009, DOR issued its Notice of Final Assessment, Form DR-43, for the period of July 1, 2002 through June 30, 2005. The September 11, 2009 assessment would become final agency action unless timely protested or contested through the informal protest process or by filing a complaint in circuit court or petition for an administrative hearing.

13. The Final Assessment was for a total of $354,839.30, which was comprised of $229,695.00 in taxes and $125,144.30 in interest. The assessment was calculated by DOR using Rhinehart's sales tax returns filed from July 2005 through March 2008.

14. Rhinehart sought informal review and then timely filed the present petition seeking an administrative hearing regarding DOR's September 11, 2009 assessment.

15. Rhinehart produced records of its sales in Florida during the period July 2002 through June 30, 2005. The records showed sales as follows: (a) one (1) sale in the second-half of 2002; (b) twelve sales (12) in 2003; (c) eighty-four (84) sales in 2004; and (d) nineteen (19) sales thorough (sic) June 2005. The total value was

$2,928,981.00.

16. Based on the sales records provided by Rhinehart, DOR revised its September 11, 2009 assessment. The revised total assessment is as follows: $159,800.31, plus accrued interest.

17. Numerous hurricanes made landfall in Florida during the 2004 and 2005 hurricane season. Since 2005 Rhinehart's sales have substantially dropped, with no sales occurring in some quarters.

18. During the period July 2002 through June 30, 2005, Rhinehart accepted a number of trade-ins. The records showed trade-in transactions as follows: (a) zero (0) in 2002; (b) five (5) in 2003; (c) eleven (11) in 2004; and (d) zero [0] in 2005. Those pieces were transported back to Rhinehart's location in Georgia. The equipment accepted as trade-in had a total value of $168,915.00. The valuation of trade-in equipment was done based on a customer's representations (i.e. sight unseen / no Rhinehart employee personally inspected the equipment) and industry guidelines.

19. Rhinehart's drivers would deliver the purchased equipment and return to Georgia, if possible, on the same day. To the extent that Department of Transportation regulations mandated that they cease driving in a given day, the drivers would rest in the back of their trucks for the required amount of time, and then complete their journey back to Georgia.

As stated by Appellant in its Initial Brief, the Administrative Law Judge (ALJ) found substantial nexus existed during the period July 1, 2002 through June 30, 2005 and that Rhinehart was therefore subject to the taxing authority of the state of Florida; the ALJ also confirmed that the assessment at issue was not time barred. (R. Vol. V, pg. 871). The ALJ *sua sponte* recommended Rhinehart be given a period of time to determine whether any of the sales made during that period would have qualified as exempt sales pursuant to Section 212.08(3), Florida Statutes, and, if so, to obtain the required certification from the purchasers and provide them to DOR, which would in turn reduce the total amount of the assessment. (R. Vol. V, pgs. 882-883). Ultimately, the ALJ recommended that DOR enter a final order "Imposing on Petitioner an assessment for the unpaid taxes, with accrued interest, for all sales made during the period July 1, 2002 through June 30, 2005 not qualifying for exemption." (R. Vol. V, pg. 883).

No exempt sales certificates were presented by Rhinehart to DOR. The DOR accepted the ALJ's recommendation *in toto* and eventually issued an Amended Final Order assessing Rhinehart the full amount of tax plus interest. (R. Vol. V, pgs. 853-895). This appeal followed. (R. Vol. V, pgs. 896-940).

SUMMARY OF THE ARGUMENT

Appellant's Initial Brief mirrors the arguments it made in the administrative proceedings below. No specific error is identified, merely that the conclusion of

the ALJ was incorrect. Accordingly, much of Appellee's Answer Brief will rely on and restate the arguments it made in the proceeding below and the conclusions made by the ALJ, believing the decision of the ALJ to be correct.

The Final Order should be affirmed in this case because Rhinehart's business activities established substantial nexus with the state of Florida through physical presence, purposely directed business activity, advertisement, and, most importantly, actual sales in the state.

At page 16 of its Initial Brief, Appellant makes the alternate argument that maybe the sales which Rhinehart made in calendar years 2004 and 2005 could be considered enough to establish "substantial nexus," but that the sales made in calendar years 2002 and 2003 are insufficient. Appellant does not cite to any statute, rule, or case authority for support of its proposition that each year (whether calendar or fiscal) must be independently examined for purposes of determining nexus regarding sales and use tax. The cases cited by Appellant are federal income tax cases, for which discrete periods, either calendar or fiscal year, exist.

Rhinehart's letter submission to DOR in September 2005, protesting the issue of nexus, is not a DOR tax return (Form DR-15). (Appendix No. 2). Rhinehart did not make any required payment of tax or file a required return during the period July 1, 2002 through June 30, 2005, nor did Rhinehart disclose in writing the tax liability to DOR before DOR contacts the taxpayer. Therefore,

Section 95.091(3)(a)5., Florida Statutes, controls and DOR could determine liability and issue an assessment at any time. The Notice of Final Assessment, issued September 11, 2009, was proper.

STANDARD OF REVIEW

The standard of review of an agency decision based upon an issue of law is whether the agency erroneously interpreted the law and, if so, whether a correct interpretation compels a particular action. *See* § 120.68(7)(d), Fla. Stat.; *Florida Hosp. v. Agency for Health Care Admin.,* 823 So. 2d 844, 847 (Fla. 1st DCA 2002).

ARGUMENT

I. THE REQUIREMENT OF APPELLANT TO COLLECT SALES TAX ON THE SALES MADE TO RESIDENTS IN FLORIDA DOES NOT VIOLATE EITHER THE DUE PROCESS CLAUSE OR COMMERCE CLAUSE OF THE U.S. CONSTITUTION.

The Due Process clause and the Commerce Clause are analytically distinct. *Quill Corp. v. N. Dakota,* 504 U.S. 298, 312 (1992). "[A] corporation may have the 'minimum contacts' with a taxing State as required by the Due Process Clause, and yet lack the 'substantial nexus' with that State as required by the Commerce Clause." *Id.* at 313. In this case, the Administrative Law Judge correctly concluded that the facts of this case established "substantial nexus" and not merely

minimum contacts.[1] Rhinehart erroneously asserts that the U.S. Supreme Court decision, *Miller Brothers Co. v. Maryland* 347 U.S. 340 (1954) is indistinguishable and controlling. It is not. The Administrative Law Judge correctly distinguished the facts and rationale in *Miller Brothers Co.*, stating that "not only are the facts in the present case different as compared to Miller Brothers, but so is the legal rationale underpinning the court's decision." (R. Vol. V, pg. 876). In support of this declaration, the Administrative Judge correctly observed:

> The facts in Miller Brothers were that the store's sales to Maryland customers were all made in Delaware where the store was located; there were no employees or agents of the store soliciting sales in Maryland; it was Miller Brother's policy never to accept telephone orders; most of the merchandise sold required personal inspection and selection at the store in Delaware; although the store did not advertise directly in Maryland it occasionally did send circulars to Maryland customers; and finally, the store delivered merchandise in Maryland, sometimes using its own trucks, sometimes common carrier.
>
> In contrast to the Miller Brothers scenario, Rhinehart's sales were all consumated[sic] in Florida. As noted earlier, section 212.02(15) defines "sale" to mean (a) Any transfer of title or possession, or both, exchange, barter, license, lease, or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration. Sale negotiations between Rhinehart and the Florida customer usually began over the telephone, and were mostly made sight unseen. Physical transfer of possession always took place

[1] Both in the proceeding below and in its Initial Brief, Rhinehart does not make this distinction but just lumps the concepts together.

> in Florida, and in several instances equipment located in Florida was taken in trade.

(R. Vol. V, pgs. 876-877).

Section 212.06(2)(c), Florida Statutes, defines "dealer" to include every person, as used in this chapter, who sells at retail or who offers for sale at retail, or who has in his or her possession for sale at retail; or for use, consumption, or distribution; or for storage to be used or consumed in this state, tangible personal property as defined herein, including a retailer who transacts a mail order sale.

Section 212.02(15)(a), Florida Statutes, defines "sale" to include: "Any transfer of title or possession, or both, exchange, barter, license, lease, or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration." Section 212.18, Florida Statutes, provides that all persons must be registered dealers before engaging in business in Florida.

Before DOR could require Rhinehart, a foreign corporation, to collect and remit tax on its sales to Florida residents, DOR was required to establish, and did establish, that Rhinehart had the requisite activity, relationship, connection, link, tie, or presence in the state (nexus) so that Florida's assertion of jurisdiction did not violate the Due Process Clause or the Commerce Clause of the United States Constitution.

Due process merely requires a definite link, some minimum contact between Florida and Rhinehart so that the maintenance of a suit does not offend "traditional

notions of fair play and substantial justice." *See Quill v. North Dakota,* 504 U.S. 298, 307(1992) (quoting *International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945)). Rhinehart's physical presence in Florida, through its repeated delivery by its own trucks, of equipment to Florida customers and the pick-up of equipment taken in trade, satisfies the minimum contact requirement. (R. Vol. VII, pgs. 97-222).

The Due Process requirement is quite low. Even when there is no physical presence in the State, due process is satisfied "[so] long as a commercial actor's efforts are 'purposefully directed'" towards a residents of another state. *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 476 (1985). Even the retailer in *Quill,* who lacked any physical presence, met this minimal standard. In this instance, Rhinehart not only had physical presence, but, in addition, purposely directed its business activities to Florida residents though advertising in *Heavy Equipment Trader,* Florida Edition.

A taxpayer may have the "minimum contacts" with a taxing State as required by the Due Process Clause and yet lack the "substantial nexus" with the State required by the Commerce Clause. These requirements are not identical and are animated by different constitutional concerns and policies. Due process concerns the fundamental fairness of governmental activity, and the touchstone of due process analysis is often identified as "notice" or "fair warning." *Quill,* 504

U.S. at 312. In contrast, the Commerce Clause and its nexus requirement are informed by structural concerns about the effects of state regulation on the national economy. *Id.*

To withstand an allegation that it has unconstitutionally burdened interstate commerce by regulation, a state tax must satisfy the four-part test articulated in *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 279 (1977). The test requires that the tax: 1) Be applied to an activity with a substantial nexus with the taxing state; 2) Be fairly apportioned; 3) Not discriminate against interstate commerce; and 4) Be fairly related to the services provided by the state. *Id.* Rhinehart has challenged only the substantial nexus part of the test.

Nexus requires "some" physical presence in the taxing state. *National Bella Hess, Inc. v. Illinois Rev. Dept,* 836 U.S. 753 (1967), *National Geographic Society v. California Board of Equalization* 430 U.S. 551 (1977). Appellant argues *Miller Brothers Co.* compels reversal of the Final Order, but, as explained above, the decision is distinguishable .

The decision in *Share Int'l, Inc. v. Dep't of Revenue,* 667 So. 2d 226 (Fla. 1st DCA 1995), *aff'd,* 676 So. 2d 1362 (Fla. 1996), *cert. denied,* 519 U.S. 1056 (1997) , which Rhinehart cites on page 14 of its Initial Brief, is likewise distinguishable for the precise reasons stated by the Administrative Law Judge, in his Recommended Order. The Judge correctly observed that

the factual situation in that case [*Share Int'l*] involved the presence of the appellee Share International, Inc., in Florida for three days a year at a seminar it conducted. The seminars were conducted for chiropractors during the winter months in Florida. Share International, Inc., sold certain items in Florida during the seminars, registered with the Department and collected and remitted the sales tax on those items sold in Florida during the seminars. It did not, however, collect Florida sales taxes on sales or orders made by telephone or mail from residents in Florida, but delivered by mail or common carrier, or on orders received during the Florida seminars but later delivered by mail or common carrier. The court upheld the trial judge's finding that imposition and collection of the sales tax on this out-of-state vendor would be unconstitutional in terms of imposing a burden on interstate commerce in violation of the federal commerce clause. This was because the presence in the State for approximately three days per year of Share employees and products, under the circumstances presented in that case did not establish a substantial nexus with Florida which would permit the state of Florida to impose on Share the duty to collect and remit taxes on its mail order sales to Florida residents. The court, through Judge Barfield's opinion, after affirming the trial judge, certified the question to the Florida Supreme Court, as to whether, under the facts of that case, "substantial nexus," within the meaning set forth in the Quill Corporation, and Nat'l Bella Hess decisions, existed which would permit Florida to require Share to collect sales and use taxes on all goods sold to Florida residents. In due course, the Florida Supreme Court in Florida Dep't of Revenue v. Share International, Inc., 676 So. 2d 1362 (Fla. 1996), speaking through Justice Anstead, affirmed and adopted the holding of the First District Court of Appeal. The Department of Revenue later petitioned for writ of certiorari to the U. S. Supreme Court. The Supreme Court in Dep't of Revenue v. Share International, 519 U.S. 1056 (1997), denied certiorari.

(R. Vol. V, pgs. 873-875).

The Administrative Law Judge additionally observed that

> with respect to the issue of nexus, however, the facts before the undersigned paint a significantly different picture than those presented in National Bella Hess, Quill, and Share. Specifically, Rhinehart's physical presence in the state during the audit period was regular and substantial. Using its employees and transport equipment, Rhinehart consummated 116 sales and deliveries to Floridians located across the state. The value of its sales to Floridians during that period was $2,928,981.00. And unlike the situations in National Bella Hess, Quill, and Share, the goods sold by Rhinehart were not delivered by mail or common carrier, but rather by employees of Rhinehart, using Rhinehart transport vehicles.

(R. Vol. V, pg. 875).

Rhinehart also relies upon the decision in *Scripto, Inc. v. Carson,* 105 So. 2d 775, 783 (Fla. 1958), *aff'd,* 362 U.S. 207 (1960), which Rhinehart cites on page 15 of its Initial Brief. This decision hurts, rather than helps Rhinehart's argument on appeal. In that case, the Florida Supreme Court found that an out-of-state retailer had a duty to impose sales tax where

> Scripto enjoys the privilege of being represented in Florida by numerous commissioned jobbers. In advancing the business enterprise of the appellant these representatives enjoy the benefits and protection of the laws of the State of Florida. It is no answer to point out that the Florida representatives of the appellant operate and own independent businesses as commissioned jobbers. To the extent that they contact Florida consumers in the interest of advancing appellant's

> business and in bringing about sales of appellant's commodities to Florida customers they are just as much representatives of the appellant under the subject statute as if they were salaried employee solicitors operating pursuant to identical limitations of contract.

Id. at 781.

In *Scripto*, the Florida Supreme Court distinguished *Miller Brothers Co.,* finding "there was no actual solicitation in the taxing state by representatives of the Delaware corporation." *Id.* at 783. Here, as in *Scripto*, and unlike *Miller Brothers Co.*, Rhinehart actively solicits business, is physically present, and is subject to tax.

ALJ Watkins further noted that:

> the Illinois case of *Brown's Furniture Inc. v. Wagner*, 171 Il. 2d 410, 665 N.E. 2d 795 (1996) provides guidance. The issue in *Brown's Furniture* was whether a Missouri furniture retailer, who physically sent its representatives to Illinois to make frequent and regular deliveries of furniture with its own trucks, satisfied the substantial nexus requirement. The state Supreme Court found it did. The court commented on the utility of the Miller Brothers, decision, stating "because Quill made clear that under contemporary due process doctrine a company is no longer required to be physically present within a state before use tax collection duties may be imposed, the continued authority of Miller Brothers is in considerable doubt." *Id.* at 804. To the extent Miller Brothers remained relevant precedence, the Illinois Supreme Court observed it to be factually different. The same differences exist in the present case.

(R. Vol. V., pgs. 877-878).

There are other factors distinguishing the two cases and which support the

conclusion that Rhinehart deliberately and systematically targeted Florida customers. Wilmington, Delaware, where the Petitioner's store in *Miller Brothers Co.,* was located, is 15.94 miles from the Maryland state line *(http://www.aaroads.com/delaware/ state_route.hmt)*. A mix of sales from residents of the border state is to be expected. In contrast, Rhinehart's dealership was located approximately 300 miles north of the Florida state line. (R. Vol. V., pg. 867). Sales invoices reflect that Rhinehart's customers were located throughout the state of Florida, as far south as Miami on the east coast and Naples on the west coast. (R. Vol. V., pg. 867). Also, contrary to the assertion of Appellant on page 12 of its Initial Brief that it wasn't specifically circulated to Florida customers, Rhinehart purposely purchased advertising in the *Heavy Equipment Trader* (Florida Edition). (Finding of Fact no. 24, R. Vol. IV., pgs. 722-723; Appendix No. 1).

Finally, the assessment being challenged is based on the requirement of Rhinehart to collect sales tax on its sales to Florida residents, and not the imposition of a use tax on Rhinehart. In *Miller Brothers Co.,* the court states "We are dealing with a relatively new and experimental form of taxation." *Miller Brothers Co. at* 343, discussing the "use tax." Analyzing the facts by the traditional due process framework, the court concluded that the imposition of a use tax upon mere possession of goods in transit by a carrier or vendor upon entering

the state would violate the Commerce Clause of the United States Constitution. *Miller Brothers Co. at* 347. Much has changed since 1954 – the "use tax" is no longer new but a concept common to all states, physical presence is not a requirement under contemporary due process doctrine, and unconstitutional interference with interstate commerce is tested utilizing the factors articulated in *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 279 (1977).

Upholding the Final Order would not require this Court to overturn a long-standing decision of the U.S. Supreme Court, as Appellant argues in its Summary of the Argument.

At page 16 of its Initial Brief, Appellant makes the alternate argument that maybe the sales which Rhinehart made in calendar years 2004 and 2005 could be considered enough to establish "substantial nexus," but that the sales made in years 2002 and 2003 are insufficient. Appellant does not cite to any statute, rule, or case authority for support of its proposition that each year (whether calendar or fiscal) must be independently examined for purposes of determining nexus regarding sales and use tax. The cases cited by Appellant, *Brent v. Comm'r of Internal Revenue,* 630 F. 2d 356 (5th Cir. 1980) and *Daoud v. Comm'r of Internal Revenue*, T.C. Memo 2010-282 (U.S. Tax Ct.) are federal income tax cases, for which discrete periods, either calendar or fiscal year, exist.

Section 212.05, Florida Statutes, states that it is the "legislative intent that

every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this state," and "[f]or the exercise of such privilege, a tax is levied on each taxable transaction or incident." § 212.05(1), Fla. Stat.

Florida Administrative Code Rule 12A-1.060(1)(a) requires every person desiring to engage in or conduct business in the state to register with the Department of Revenue. The focus is on the actions of the actor - engaging in the business of selling, and not one discrete act. Like the farmer preparing the field for future harvest, Rhinehart targeted Florida and began preparing the market for future development. Also, we really don't know how many sales were made in the year 2002, as the period under review only began in July. No record evidence was submitted to identify sales for the entire calendar year.

II. THE STATUTE OF LIMITATIONS FOR ASSESSING SALES TAX HAD NOT EXPIRED WHEN DOR ISSUED ITS ASSESSMENT.

Rhinehart argues its letter submission to DOR in September 2005, protesting the issue of nexus, started the running of the three (3) year statute of limitations on assessments, and that DOR's Notice of Final Assessment, dated September 11, 2009 (Vol VI, pgs. 51-52) is outside the statute.

> Section 95.091(3)(a), Florida Statutes, provides:
>
> With the exception of taxes levied under chapter 198 and tax adjustments made pursuant to ss. 220.23 and 624.50921, the Department of Revenue may determine

and assess the amount of any tax, penalty, or interest due under any tax enumerated in s. 72.011 which it has authority to administer and the Department of Business and Professional Regulation may determine and assess the amount of any tax, penalty, or interest due under any tax enumerated in s. 72.011 which it has authority to administer:

1.a. For taxes due before July 1, 1999, within 5 years after the date the tax is due, any return with respect to the tax is due, or such return is filed, whichever occurs later; and for taxes due on or after July 1, 1999, within 3 years after the date the tax is due, any return with respect to the tax is due, or such return is filed, whichever occurs later;

b. Effective July 1, 2002, notwithstanding sub-subparagraph a., within 3 years after the date the tax is due, any return with respect to the tax is due, or such return is filed, whichever occurs later;

2. For taxes due before July 1, 1999, within 6 years after the date the taxpayer makes a substantial underpayment of tax or files a substantially incorrect return;

3. At any time while the right to a refund or credit of the tax is available to the taxpayer;

4. For taxes due before July 1, 1999, at any time after the taxpayer filed a grossly false return;

5. At any time after the taxpayer failed to make any required payment of the tax, failed to file a required return, or filed a fraudulent return, except that for taxes due on or after July 1, 1999, the limitation prescribed in subparagraph 1. applies if the taxpayer disclosed in writing the tax liability to the department before the department contacts the taxpayer; or

6. In any case in which a refund of tax has erroneously

been made for any reason:

> a. For refunds made before July 1, 1999, within 5 years after making such refund; and
> b. For refunds made on or after July 1, 1999, within 3 years after making such refund, or at any time after making such refund if it appears that any part of the refund was induced by fraud or the misrepresentation of a material fact.

§ 95.091(3)(a), Fla. Stat. (emphasis supplied)

Rhinehart did not make any required payment of tax or file a required return during the period July 1, 2002 through June 30, 2005, nor did Rhinehart disclose in writing the tax liability to DOR before being contacted by DOR. Rhinehart's September 30, 2005, letter of protest does not contain the information that would have been contained on a tax return, though Rhinehart argues otherwise, at page 18 of its Initial Brief. Section 213.755 (2)(b), Florida Statutes, addresses "returns." Florida Administrative Code Rule 12A-1.097 identifies the public use forms employed by DOR. Compare the exhibit in Appendix 2 (a form DR-15 state sales and use tax return) with the September 30, 2005 letter (R. Vol. VI, pgs. 020-026). None of the information required on the form DR-15 is contained in the protest letter. It is insufficient as a matter of law. Therefore, Section 95.091(3)(a)5., Florida Statutes, controls and DOR may pursue an assessment "at any time..." after a taxpayer has failed to make any required payment of the tax unless the taxpayer has disclosed in writing the liability before being contacted by DOR.

Appellant did not. The Notice of Final Assessment, issued September 11, 2009, was proper.

CONCLUSION

In administrating its tax laws, Florida, like most states, has a statutory scheme based on a synthesis of the most current application of US Supreme Court decisions. The Final Order should be affirmed.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by email to Rex D. Ware, Esq., (Rex.Ware@bipc.com), and to Richard L. Winston, Esq., (richard@winstonpa.com) this 15th day of January, 2015

CERTIFICATE OF COMPLIANCE

I herby certify that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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