

**IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT
TALLAHASSEE, FLORIDA**

RHINEHART EQUIPMENT CO.,

Appellant,

vs.

CASE NO.: 1D14-3966

LT CASE NO.: 11-2567

**FLORIDA DEPARTMENT OF
REVENUE,**

Appellee.

**APPEAL FROM THE FINAL ORDER OF THE STATE OF
FLORIDA, DEPARTMENT OF REVENUE**

INITIAL BRIEF OF APPELLANT RHINEHART EQUIPMENT CO.

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PRELIMINARY STATEMENT

In this brief, Appellant, Rhinehart Equipment Co., will be referred to as Appellant or by name. The Appellee, Florida Department of Revenue will be referred to as Appellee or Department or DOR.

Citations to the original record on appeal will be made by the letter "R" and the appropriate page number.

STATEMENT OF THE CASE AND FACTS

DOR is responsible for administering Chapter 212, Florida Statutes, which governs the application of sales and use tax to the sale of tangible personal property in the State of Florida. DOR's authority to apply the tax to certain transactions is limited by provisions of the U.S. Constitution, including the Due Process Clause of the Fourteenth Amendment and the Commerce Clause of Article I, Section 8 of the U.S. Constitution.

In this proceeding, the parties stipulated to the following facts. (Where Rhinehart has supplemented those facts, additional references to the record have been added) Rhinehart Equipment Co. ("Rhinehart") is a retail heavy equipment dealer (e.g., Bobcat distributor) located in Rome, Georgia. Rhinehart does not own or maintain a showroom or office space location in Florida, nor does it directly provide financing to any Florida resident for any of its sales. 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.

During the years 2002-2005, Rhinehart delivered equipment to Florida customers from Georgia using its own trucks. Rhinehart advertised with the Trader Publishing Company which is distributed in Georgia, Alabama, Florida, and

Tennessee. Rhinehart did not collect sales and use tax when selling its heavy equipment from Georgia to customers in other states.

By letter dated March 31, 2005, DOR contacted Rhinehart and advised that its business activities with Florida customers may require Rhinehart to register as a “Florida dealer” for sales and use tax. 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 future sales and use tax to the State of Florida. 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).

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. Rhinehart’s legal counsel believed that the request from the DOR was faulty. When Rhinehart started to collect and remit sales tax to the DOR for sales to Florida customers, it noted in writing by cover letter (every month) that its returns were being filed solely “under protest.” Rhinehart declined to provide any information regarding sales made prior to July 1, 2005. (R-10-15)

On September 30, 2005, Rhinehart’s counsel sent via Federal Express, a detailed protest letter to the DOR and advised that: (1) Rhinehart 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. Rhinehart's counsel cited to a U.S. Supreme Court case (Miller Brothers) that stood for the direct proposition that a company cannot have taxable nexus in another State merely because it uses its own vehicles to deliver product to customers in that other State. (R-52-59)

On May 23, 2008, DOR issued a Notice of Intent To make an Assessment, and on September 11, 2009 (approximately four years after Rhinehart's counsel first disputed the position of DOR), 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. 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.

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

As requested by DOR before the administrative hearing, Rhinehart produced records of its sales in Florida during the period July 2002 through June 30, 2005.

The records showed the 2002-2005 sales as follows: (a) **one** sale in the second-half of 2002; (b) **twelve** sales in 2003; (c) **eighty-four** sales in 2004; and (d) **nineteen** sales thorough June 2005. The total value was \$2,928,981.00.

Based on the sales records provided by Rhinehart, the DOR revised its September 11, 2009 assessment. The revised total assessment is as follows: \$159,800.31, plus accrued interest. Numerous hurricanes made landfall in Florida during the 2004 and 2005 causing the temporary increases in sales during those years. Since 2005, Rhinehart's sales have substantially dropped, with few or no sales occurring in most quarters.

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** in 2002; (b) **five** in 2003; (c) **eleven** in 2004; and (d) **zero** in 2005. Those pieces were transported back to Rhinehart's location in Georgia. The equipment accepted as a trade-in had a total value of \$168,915.00. The valuation of trade-in equipment was performed based on a customer's representations (i.e. sight unseen--no Rhinehart employee personally inspected the equipment) and industry guidelines.

In a typical sales transaction with a Florida customer, 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 a driver cease driving in a given day, the driver would rest in the back of

his/her truck for the required amount of time, and then complete their journey back to Georgia.” (R-405-410)

Pursuant to the stipulated facts and exhibits, both parties submitted Motions for Summary Recommended Order. (R-411-453 and 568-680) Additionally, both parties filed responses in opposition to the other party’s Motion (R-681-704 and 705-711).

The Administrative Law Judge issued his Summary Recommended Order recommending that DOR uphold the assessment but allow Rhinehart a reasonable amount of time to obtain exemption certificates. (R-713 739) Rhinehart filed exceptions to the Recommended Order. (R-745-753) and the Department responded to those exceptions (R-754-758).

The Department’s Final Order adopted the ALJ’s Recommended Order in toto and provided the usual notice regarding appeal rights. (R-759-800) Rhinehart filed a Notice of Appeal, and in response, this Court determined (*sua sponte*) that the Final Order was not actually “final” because DOR had left some issues unresolved (R-846-848).

DOR issued its Amended Final Order on August 4, 2014, again upholding the ALJ’s Summary Recommended Order (R-853-895).

STANDARD OF REVIEW

As recently detailed by the Florida 4th District Court of Appeal in *American Business Corp. v. Department of Revenue*, 2013 WL 7116688 (Fla. 4th DCA 2014) (overturning a Florida sale and use tax assessment because “Florida impermissibly burdened interstate commerce”), the standard of review in a case such as this is:

“Whether a lower tribunal had subject matter jurisdiction is a question of law which we review *de novo*.” *Dep’t of Revenue ex rel. Smith v. Selles*, 47 So. 3d 916, 918 (Fla. 1st DCA 2010). “Lack of subject matter jurisdiction may be raised for the first time on appeal.” *Id.* (citation omitted). Further, “judicial interpretation of statutes and determinations concerning the constitutionality of statutes are pure questions of law subject to the *de novo* standard of review.” *Abram v. Dep’t of Health, Bd. of Med.*, 13 So. 3d 85, 88 (Fla. 4th DCA 2009) (citation omitted). Since this case involves an administrative agency, issues of the constitutionality of the tax statute may be raised for the first time on appeal. *See S. Alliance for Clean Energy v. Graham*, 113 So. 3d 742, 748 (Fla. 2013).

Applying the appropriate standard of review and the principles of law set forth herein, this Court must reverse the Department’s Amended Final Order.

SUMMARY OF THE ARGUMENT

The Florida Department of Revenue's jurisdiction to impose sales and use tax on transactions that are interstate in nature is limited by the Due Process and Commerce Clauses of the U.S. Constitution. Because there was not sufficient contacts nor substantial nexus between Rhinehart and the State of Florida, the assessment of taxes at issue in this proceeding was in violation of those provision of the Constitution and improper and illegal. To uphold the assessment would require this Court to overturn a long-standing decision of the U.S. Supreme Court (*Miller Brothers Co.*) in a case with similar facts. Alternatively, at a minimum, the transactions in the first two years of the assessment period (i.e., one sale and twelve sales, respectively) were legally insufficient to establish sufficient nexus to allow Florida impose a sales or use tax.

Further, the three year statute of limitations set forth in Section 95.091, Florida Statutes, expired prior to the issuance of the final assessment. After waiting to assess taxes for approximately four years after Rhinehart filed a lengthy protest denying liability (with proper citations to *Miller Brothers Co.*), the Department was prohibited from assessing those taxes.

ARGUMENT

I. THE DUE PROCESS AND COMMERCE CLAUSES OF THE U.S. CONSTITUTION LIMIT THE JURISDICTION OF THE FLORIDA DEPARTMENT OF REVENUE TO TAX THE TRANSACTIONS AT ISSUE IN THIS CASE

In its Amended Final Order, incorporating the Recommended Order of the Administrative Law Judge (“ALJ”), the Department improperly upheld the assessment of sales and use tax against Rhinehart by failing to heed the mandate of the United States Supreme Court in a case involving nearly identical facts (discussed further below). This Supreme Court case stands for the proposition that a State may not impose taxes on an out-of-state company that uses its own trucks to deliver products into the State. This U.S. Supreme Court case was also cited favorably by a Florida trial court in a case affirmed both by this Court and the Florida Supreme Court. In other words, DOR’s Amended Final Order overturned decisions of the U.S. Supreme Court as well as this Court.

In this case, Rhinehart is located in Georgia. It took sales orders from Florida customers and delivered merchandise to those customers using its own drivers and trucks. The heavy equipment sold by Rhinehart could not easily be picked up by a customer at Rhinehart’s place of business, so Rhinehart offered delivery to all customers (local and interstate). In the first year included with the final assessment (i.e., 2002), Rhinehart made only **one** sale and one delivery into the State of Florida. In the second year, Rhinehart made only twelve sales and

twelve deliveries. In years three and four, in response to a rash of hurricanes and the unavailability of similar equipment in Florida, Rhinehart made 84 and 19 sales and deliveries into the State, respectively. Rhinehart did not seek out Florida customers, but rather, those customers sought out Rhinehart to fill a critical need during a State emergency. Thereafter, sales declined drastically, including many quarters with no sales into Florida. In addition to deliveries, Rhinehart did minimal advertising by purchasing ads in a multistate trade publication known as the Heavy Equipment Trader. It is important to note that this “advertisement” was not directed to customers generally in any State.

In *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954), the United States Supreme Court unequivocally ruled that the application of a sales and use tax to a foreign entity based on the mere delivery of goods into the taxing state (with a delivery truck) is unconstitutional. The holding in *Miller Bros.* is still good law and the U.S. Supreme Court has never overturned or receded from the principles of nexus espoused therein.

The petitioner in *Miller Bros.*, a Delaware company, used its own drivers and trucks to deliver its merchandise to Maryland residents. See *Id.* at 345-46. In addition, the petitioner advertised in Maryland, including directly mailing sales circulars to its former customers. See *id.* at 341-42. The U.S. Supreme Court held that delivery of merchandise into Maryland using its own trucks and drivers was

legally insufficient to allow Maryland to impose a tax on the petitioner. See *id.* at 345-46. The court reasoned that “due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.” *Id.* at 344-45. The Court further noted that Miller Brothers’ additional contacts with the State of Maryland, in the form of advertising to customers in Maryland, when viewed with the delivery of merchandise to Maryland, was insufficient to establish Maryland’s authority to tax the Delaware company. *Id.* at 342, 345-346.

If appropriately applied, the standards set forth in *Miller Bros.* compel a finding that there was insufficient nexus in this case for DOR to assess a tax against Rhinehart based on its delivery of merchandise to Florida customers and its minimal advertising in the State. Just like the petitioner in *Miller Bros.* in the State of Maryland, Rhinehart had no employees, no offices, no property nor any agents soliciting sales in the State of Florida. Further, just like in *Miller Bros.*, Rhinehart made deliveries in its own trucks with its own drivers into the other state and paid for some form of advertising in the State. And, just as the U.S. Supreme Court in *Miller Bros.* concluded that there were not sufficient contacts to allow the State of Maryland to constitutionally impose a tax in *Miller Bros.*, so too this Court must conclude that the facts herein are inadequate to establish sufficient nexus between

the seller and the State for DOR to exercise jurisdiction to impose of sales and use tax on Rhinehart.

In its Amended Final Order, the Department concludes that Rhinehart “deliberately and systematically” targeted Florida customers and that this act somehow confirms nexus with Florida. However, the Department, in the conclusions of law, relies on a “fact” that was not established in the record, and is, in fact, false, to wit: “Rhinehart directly and regularly advertised in a Florida publication specifically circulated to potential Florida customers.” The trade publication that Rhinehart advertised in was not “circulated” to potential Florida customers; rather, it was a multistate publication, and Rhinehart had no control where the publication was circulated. The customers of the trade publication also had to pay for the publication (which is different than directing mass catalogs to potential Florida customers). Further, the level of advertising performed by Rhinehart in this case did not exceed that of the petitioner in *Miller Bros.*. Not only did the *Miller Bros.* petitioner send circulars to customers in Maryland, but it also published advertisements in Delaware newspapers that were circulated across state lines, and it advertised with radio stations that broadcast into Maryland. *Miller Bros.*, 347 U.S. at 341, 358. If the petitioner in *Miller Bros.* was not “exploiting the market” through its contacts with Maryland, certainly Rhinehart was not doing so in Florida.

Further, in the Amended Final Order, ignoring the U.S. Supreme Court precedent in *Miller Bros.*, the Department instead relies on the decision of the Illinois Supreme Court in *Brown Furniture Inc. v. Wagner*, 171 Ill. 2d 410, 665 N.E. 2d 795 (1996), finding that a Missouri furniture retailer had sufficient nexus with Illinois to warrant imposition of the tax. However, upon close examination, it is clear that the facts of that case are not analogous to those in this matter. In *Brown*, the Missouri vendor made 942 deliveries into Illinois in a 10 month period (an average of more than three deliveries per day). In this case, there was only one trip into Florida during the first year, and 12 trips during the second year. During the 2004 hurricane season, there was an average of less than 2 trips per week (84 total trips during the year). For the first half of 2005, there were 19 trips total. In *Brown*, there were more than 2800 individual advertisements in the 10 month period, leading the Illinois Supreme Court to find that the vendor exploited the Illinois market with such regular and frequent contacts to justify the imposition of tax to the vendors Illinois sales (i.e., the Missouri vendor was basically running a **full time business** in Illinois).

In this case, applying the U.S. Supreme Court precedent of *Miller Bros.*, quite distinct from *Brown*, there were no regular and frequent contacts sufficient to justify the tax. Certainly, Rhinehart's single transaction in 2002, or twelve transactions in 2003, or remaining transactions in 2004 and 2005 do not rise to the

level of the required physical presence, let alone a "regular and frequent basis" as contemplated in *Miller Bros.* or *Brown*. The DOR would like this Court to believe that the issue of "taxable nexus" should be a numbers game. Miller Bros. Co. did not subscribe to that finding, as that finding would always ignore a case where a random event, such as a hurricane, may cause a company to increase its sales to a neighboring state for a short period even though the company was not actively "directing" its business to that State.

In the Amended Final Order, the Department further attempts to discount *Miller Bros.*, by citation to language in the *Brown* decision that the U.S. Supreme Court's decision in *Quill v. North Dakota*, 504 U.S. 298 (1992) somehow overruled or watered down the principles espoused in *Miller Bros.*. However, the language cited is merely the Illinois Supreme Court commenting on a U.S. Supreme Court decision that the U.S. Supreme Court has not overruled or withdrawn. Additionally, the Department fails to point out that the courts of this State have, in fact, cited to and approved the principles set forth in *Miller Bros.*, to wit: "[s]ubstantial nexus' exists only if the foreign corporation is present within the state conducting the activity to be taxed," See *Share Int'l, Inc. v. Dep't of Revenue*, Case No. 92-2918 (Fla. Cir. Ct. 2d 1993), *aff'd*, 667 So. 2d 226 (1st DCA 1995), *aff'd*, 676 So. 2d 1362 (Fla. 1996) that held that the foreign vendor's

practice of simply delivering its products to customers in Florida did not establish such a presence, and thus created no nexus.¹

Quite simply, based on the U.S. Supreme Court's decision in *Miller Bros.*, there is insufficient nexus to justify DOR exercising jurisdiction to impose the sales and use tax upon Rhinehart for the entire period at issue and the entire assessment must be invalidated. To rule otherwise would be to overrule *Miller Bros.*, a long-established U.S. Supreme Court case that and has been favorably cited by Florida courts in the past, as well as other U.S. Supreme Court decisions.

In *Scripto, Inc. v. Carson*, 105 So.2d 775, 783 (Fla. 1958), *aff'd*, 362 U.S. 207 (1960), the Florida Supreme Court, in finding nexus against Scripto, approved and contrasted the facts in *Miller Bros.*:

There the only 'jurisdictional contract' between Miller Brothers Co., a Delaware corporation, and the State of Maryland was advertising in Delaware newspapers and radio stations that reached the notice of the

¹ DOR's Amended Final Order also attempts to circumvent the principles of minimum contacts and substantial nexus when it rules that Florida's mail order statute, Section 212.0596, Florida Statutes, somehow provides further authority to rule against Rhinehart. Clearly, as the parties agreed throughout the litigation and as dictated by the Department earlier in the same Final Order: "It has been determined that the taxability of a transaction made by an out-of-state vendor into Florida resulting in shipment of the goods which are the subject of the transaction into Florida, depends on the out-of-state vendor's "substantial nexus" with the state." In other words, even though Florida has a mail order statute which purports to establish sale and use tax nexus in most any case, that statute is tempered and limited to imposing tax in those situations where its application does not offend the Due Process and/or Commerce Clauses of the U.S. Constitution.

Maryland residents and the occasional mailing of notices to former customers in Maryland. In *Miller Brothers Co* there was no actual solicitation of business in the taxing state by representatives of the Delaware corporation. The non-resident corporation maintained no representation whatsoever in the taxing state. Justifiably, it appears to us, the essential aspects of jurisdictional contact for taxing purposes were lacking.

Rhinehart did less advertising in Florida than the petitioner in *Miller Bros.* did in Maryland. But like the Delaware petitioner in Maryland, there was “no actual solicitation of business” in Florida by representatives of Rhinehart. Similar to the petitioner in *Miller Bros.* in Maryland, Rhinehart maintained no representation whatsoever in Florida. And, just like *Miller Bros.*, the “essential aspects of jurisdictional contact for taxing purposes” is lacking.

This Court must reverse the Amended Final Order in its entirety.

Alternatively, at a minimum, there was clearly insufficient or de minimis nexus in the 2002 year (one transaction) and the 2003 year (twelve transactions), and those years must be removed from the assessment. Offering no authority, DOR asserts that it can combine multiple years together to attribute “taxable nexus” from future years back to earlier years where there was no nexus (i.e., a creative “hindsight” approach to taxation).²

² DOR has previously determined through rulings that an entity can have nexus one year and then, through lack of activity or disconnection, lose nexus in a succeeding year. See DOR *Technical Assistance Advisement No. 09A-058*, November 9, 2009, finding that a company no longer had sales and use tax nexus once it cancelled its

While there is no Florida case law precedent on the issue, federal income tax principles can be applied, to wit: "the tax year concept does not permit retroactive adjustments with the benefits of hindsight." *See Brent v. Comm'r of Internal Revenue*, 630 F.2d 356 (5th Cir. 1980); *see also Daoud v. Comm'r of Internal Revenue*, No. 12070-04, T.C. Memo 2010-282 (Dec. 22, 2010 U.S. Tax Ct.) (rejecting the IRS's attempt to impute fraud that was proven in a later year to an earlier year so the IRS could impose fraud penalties on all of the tax years at issue.)

Logically, until a potential collector of a State's tax reaches a level of activity justifying a finding of substantial taxable nexus, there is not sufficient nexus to impose the tax. In this case, there was never such a level of activity, but certainly not in the first two years considered.

II. THE FLORIDA DEPARTMENT OF REVENUE IS BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS FROM ASSESSING THE TAXES AT ISSUE IN THIS CASE

Even if DOR could exercise jurisdiction to tax the transactions at issue in this proceeding, the applicable statute of limitations expired before the Department issued an assessment. Accordingly, the Final Order must be reversed and the assessment withdrawn in its entirety.

lease of real property in Florida as its last remaining contact with the State. Applying those same principles here, DOR should have recognized that, at a minimum, nexus was not sufficient in years when Rhinehart had one and twelve sales, respectively.

The applicable statute of limitations is set forth Section 95.091(3)(a), Florida

Statutes. It provides, in pertinent part:

(3)(a) 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...:

1.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;**

.....

5. At any time after the taxpayer has failed to make any required payment of the tax, has failed to file a required return, or has 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 has disclosed in writing the tax liability to the department before the department has contacted the taxpayer; (emphasis added).

In this case, sub-paragraph (1)b. is applicable and DOR did not attempt to assess the tax within three years of the date that Rhinehart filed a lengthy protest with the DOR which (1) advised it that there was an insufficient taxable nexus between Rhinehart and the State of Florida and (2) provided DOR with all of the information that would have been contained on a tax return, had a tax return been required to be filed (including Rhinehart's tax ID number, address, and name of counsel). The assessment is thus invalid.

The DOR waited approximately four years after the DOR received Rhinehart's lengthy protest to issue its assessment. The DOR did not lose track of

Rhinehart as it was exchanging correspondence with Rhinehart's counsel during this entire period. This egregiously tardy assessment arrived an entire year after the statutory limitation period expired in September 2008, per Section 95.091(3)(a), Florida Statutes.

In its Amended Final Order, DOR seemingly disregards Section 95.091(3)(a)1. and instead cites to Section 95.091(3)(a)5 for the proposition that the statute of limitations never runs for a taxpayer who files a lengthy protest with the DOR to object to the DOR's false assertion of nexus. If the DOR's position were correct, it could hypothetically wait until the year 2050 to assess taxes against Rhinehart (even though Rhinehart objected to the DOR's finding of nexus in 2005).

This Court should not accept DOR's position that it has more than 3 years to assess taxes after a taxpayer provides all of its proper identifying information and argues that it is not subject to tax (citing to a U.S. Supreme Court precedent). If the DOR cannot find a way to assess taxes in 3 years, it certainly has internal challenges beyond what the Florida Legislature understood.

In this case, because Rhinehart provided DOR with all of the information, in September 2005, that would have been reflected on a tax return, the statute of

limitations began to run and expired in September 2008 for all periods prior to September 2005.³

Upon receipt of Rhinehart's September 30, 2005 filing, DOR had three years to proceed with one of the following possible courses of action: (1) provide an assessment within the three year period; (2) initiate an audit and *request* tolling the same statutory period; or (3) do nothing and accept Rhinehart's protests thereby waiving its claim to the sales and use tax in this case. DOR failed to timely

³ The Notice of *Intent* to make an Assessment issued on May 23, 2008 did not serve to toll the period for issuing an assessment as it did not comply with DOR's statutes or rules for issuing a Notice of Intent to Audit (and the "audit," if any was not completed within 120 days). Further, the resulting Notice of Final Assessment issued in September of 2009 did not indicate that it was the result of an audit. Section 213.345, Florida Statute, entitled "Tolling of periods during an audit" states:

The limitations in s. 95.091(3)...shall be tolled for a period of 1 year if the Department of Revenue has...issued a notice of intent to conduct an audit or investigation of the taxpayer's account within the applicable period of time. The department must commence an audit within 120 days after it issues a notice of intent to conduct an audit, unless the taxpayer requests a delay. If the taxpayer does not request a delay and the department does not begin the audit within 120 days after issuing the notice, the tolling period shall terminate unless the taxpayer and the department enter into an agreement to extend the period pursuant to s. 213.23.

Even had the Notice of Intent to make an Assessment been effectual and tolled the period, it would have limited DOR's ability to only go back to the April 2005 tax month (three years from the notice in May 2008) to begin the "audit" period. See: *Harris v. Dept. of Revenue*, 409 So. 2d 91, 92 (Fla. 1st DCA 1982) (DOR precluded from applying tolling provision where DOR provided notification to taxpayer of proposed audit but failed to file assessment within statutory period).

respond to Rhinehart’s filing with a formal assessment (to trigger Rhinehart’s legal rights).

Tolling the statute of limitations, or allowing DOR to enforce its assessment outside of the statute of limitations, is “inequitable and inconsistent with the general purpose of statutes of limitations, i.e., to protect defendants against stale or unduly delayed claims.” *Credit Suisse Sec., LLC v. Simmonds*, 132 S. Ct. 1414, 1420 (2012) (stating general purpose of a statute of limitations in context of allowing an action under Securities Exchange Act to exceed statute of limitation); *John R. Sand & Gravel Co. v. U.S.*, 128 S. Ct. 750, 753 (2008) (“most statutes of limitations seek primarily to protect defendants against stale or unduly delayed claims”); see also *Fla. Dep’t. of Health and Rehab. Servs. v. S.A.P.*, 835 So. 2d 1091, 1096 (Fla. 2002) (stating that a “prime purpose underlying statutes of limitation is to protect defendants from unfair surprise and stale claims.”) Neither law nor equity supports enforcement of the assessment against Rhinehart. Because the statute of limitations expired prior to the issuance of the final assessment at issue herein, the Final Order of the Department must be reversed.

CONCLUSION

As set forth above, the Amended Final Order of the Department of Revenue must be reversed. DOR lacks jurisdiction to impose of sales and use tax on the transactions that form the basis of the final assessment at issue based on the Due

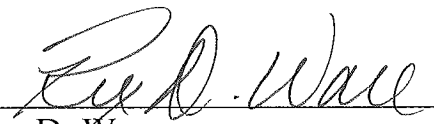
Process and Commerce Clauses of the U.S. Constitution. Further, the Final Order must be reversed because the statute of limitations expired prior to the issuance of the final assessment that DOR attempts to enforce.

CERTIFICATE OF COMPLIANCE

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

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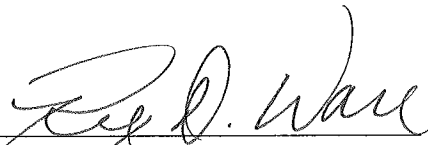

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