IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT IN AND
FOR LEON COUNTY, FLORIDA

CASE NO.: 2011 CA 1498

DIVISION: Civil

VERIZON BUSINESS PURCHASING, LLC,
a foreign limited liability company,

Plaintiff,

v.

STATE OF FLORIDA DEPARTMENT OF
REVENUE, an agency of the State of Florida,

Defendant.
_____/

PLAINTIFF'S MOTION AND INCORPORATED MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Plaintiff, Verizon Business Purchasing, LLC ("VBP"), by and through its attorneys, Akerman Senterfitt, moves for summary judgment in its favor and against the Defendant, State of Florida, Department of Revenue (the "Department") pursuant to Florida Rules of Civil Procedure 1.510 and in support states as follows.

INTRODUCTORY STATEMENT

There is nothing more fundamental to the administration of the tax laws than the statute of limitations on assessment. Under Section 95.091(3)(a), Florida Statutes, the Department must "assess" a taxpayer "within 3 years after the date the tax is due, or such return is filed, whichever occurs later." Section 213.23, Florida Statutes, permits the Department and the taxpayer to enter into written agreements to extend the three-year limitations period contained in Section 95.091(3)(a), Florida Statutes. An assessment issued after the statutory deadline has expired is necessarily invalid as a matter of law.

The statutorily-defined period for the issuance of an assessment under Section 95.091(3)(a), Florida Statutes, necessarily reflects a careful balance between a taxing authority's need for sufficient information to correctly assess a taxpayer against the taxpayer's need to defend itself within a reasonable time period. *See e.g.*, *Stromberg-Carlson Corp. v. State Tax Assessor*, 765 A.2d 566 (Me. 2001) and *Comptroller v. Digi-Data Corporation*, 562 A.2d 1259 (Md. 1989) ("the primary purpose of all statutes of limitations is to achieve repose after a period of time deemed reasonable by the legislature in light of the competing interests involved."). The sole issue addressed by this Motion is the proper computation of the three-year statute of limitations for assessment outlined under Florida law.

The crux of the underlying dispute is the legal significance attached to the Department's issuance of Form DR-831 entitled "Notice of Proposed Assessment" (hereinafter referred to as "Form DR-831" or the "Notice of Proposed Assessment"). The Department's audit procedure is undeniably straightforward and applies indiscriminately to both corporate income and sales and use taxes. If after auditing a taxpayer's return the Department determines that additional tax is due, the Department will issue Form DR-1215 entitled "Notice of Intent to Make Audit Changes." If the Department and the taxpayer are unable to resolve their disagreements as to the initial audit results, the next step in the audit process is for the Department to issue a Notice of Proposed Assessment on Form DR-831. Form DR-831 informs the taxpayer of the amount of additional tax the Department proposes to assess and by its terms becomes a final assessment in sixty days.

The Department's tax procedure is clear and unambiguous. The Notice of *Proposed* Assessment does not become a *final* assessment until sixty days *after* its issuance. In this case, the Department mailed a Notice of Proposed Assessment to VBP with less than sixty days left in

the statute of limitations window. As a result, on March 31, 2011, the mutually agreed date by which the Department was required to assess VBP, the *proposed* assessment reflected on Form DR-831 had not yet become a legal assessment under Section 95.091(3)(a), Florida Statutes. Because the *proposed* assessment issued to VBP did not become a final assessment until after the expiration of the extended statute of limitations period, the Department failed to timely assess VBP.

The Department has taken the baseless position in this case that the issuance of the Notice of *Proposed* Assessment is a legal "assessment" for purposes of Section 95.091(3)(a), Florida Statutes. While this argument is patently untenable in the face of overwhelming contrary authority, the Department has been left with no other option. The truth of the matter in this case is that the Department simply failed to timely issue the Notice of Proposed Assessment to VBP with sufficient time left in the limitations period. Despite any attempts by the Department to distract this court from this core fact, this reality is unavoidable.

Form DR-831 is not an assessment under Section 95.091(3)(a), Florida Statutes, for three independent reasons. First, Section 213.21(1)(b), Florida Statutes, when read in conjunction with Section 95.091(3)(a), Florida Statutes, leaves no doubt that the issuance of Form DR-831 has no effect on the statute of limitations within which the Department must assess a taxpayer. Second, employing the longstanding rules of statutory construction, the "common, ordinary meaning" of the term "assess" and "assessment" make clear that the issuance of a *proposed* assessment by the Department on Form DR-831 fails to satisfy the limitations requirements of Section 95.091(3)(a), Florida Statutes. Lastly, statutory guidance under Chapter 220, Florida

Statutes,[1] applies in this case making clear that a *proposed* assessment is not an *assessment* under Section 95.091(3)(a), Florida Statutes.

STATEMENT OF FACTS NOT GENUINELY IN DISPUTE

The material facts for this motion all come from allegations in VBP's First Amended Complaint, which the Department admitted as true in its answer, and from the various documents that the Department issued during the course of its audit of Verizon, the authenticity of which the Department has likewise admitted in its answer. Those facts and documents that are not genuinely in dispute are as follows:

The Department audited VBP for sales and use taxes under Chapter 212, Florida Statutes, for the period January 1, 2004 through December 31, 2006 (the "Audit Period"). [Complaint, ¶8; Answer ¶8.][2] On October 27, 2008, the Department issued Form DR-1215 – Notice of Intent to Make Audit Changes (hereinafter, the "NOI") – to VBP relating to the Department's audit of the Audit Period. [Complaint, ¶11; Answer, ¶11.] On or about August 6, 2010, the Department and VBP executed Form DR-872 – Consent to Extend the Time to Issue an Assessment or to File a Claim for Refund (the "Extension Request"). [Complaint, ¶12; Answer, ¶12.] A true and correct copy of the Extension Request is attached hereto as Exhibit A. [Complaint, ¶12; Answer, ¶12.] The express purpose of the Extension Request was to make clear the agreement of the parties that under Section 95.091(3)(a), Florida Statutes, the Department had until **March 31, 2011** to assess VBP. [Complaint, ¶12; Answer, ¶12.]

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[1] The current dispute deals with an alleged liability for sales and use taxes under Chapter 212, Florida Statutes. Chapter 220, Florida Statutes, relates to corporate income taxes. As described more fully below, the tax appeal procedure pertinent to corporate income taxes is identical to that applicable to sales and use taxes.

[2] All references to the "Complaint" in this section are to "Plaintiff's First Amended Complaint." Likewise, all references to the "Answer" in this section are to the Department's "Answer to First Amended Complaint and Affirmative Defenses."

On February 8, 2011, the Department issued a Notice of Proposed Assessment under Chapter 212, Florida Statutes, to VBP for sales and use taxes and interest totaling $3,169,168.74. [Complaint, ¶15; Answer, ¶15.] A true and correct copy of the Notice or Proposed Assessment is attached hereto as Exhibit B. [Complaint, ¶15; Answer, ¶15.] The Notice of Proposed Assessment stated that the proposed tax liability described thereon would become a final assessment sixty days from its issue date, or **April 11, 2011,** eleven days after the agreed Extension Request expired. [Complaint, ¶16; Answer, ¶16; Ex. C – Notice of Proposed Assessment.]

VBP exhausted its administrative remedies asserting, in part, that the *proposed* assessment outlined in the Notice of Proposed Assessment was not an "assessment" for purposes of Section 95.091(3)(a), Florida Statutes, and because the Extension Request expired prior to the close of the sixty-day window articulated in the Notice of Proposed Assessment, the Department failed to timely issue an assessment to VBP.

STANDARD OF REVIEW

Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law. *Menendez v. Palms West Condominium Ass'n*, 736 So. 2d 58 (Fla. 1st DCA 1999). There is no dispute as to any material fact in this case that would preclude entry of summary judgment in favor of VBP.

ARGUMENT

I. The Florida Legislature has Made Clear that the Issuance of Form DR-831 is Not an Assessment for Purposes of Section 95.091(3)(a), Florida Statutes

The Florida Legislature has carefully crafted the tax laws of the State of Florida leaving no doubt that a Notice of *Proposed* Assessment is of no legal significance for limitations purposes. Section 95.091(3)(a), Florida Statutes, states that the Department must "assess" a

taxpayer "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." This three-year statute of limitations window applies with limited exception to *all* taxes administered by the Department including – as applicable in this case – sales and use taxes. Although Section 95.091(3)(a), Florida Statutes, does not expressly define the term "assess," the Florida Legislature's enactment of Section 213.21, Florida Statutes, makes clear that the three-year limitations period set forth in Section 95.091(3)(a), Florida Statutes, is satisfied by the issuance of a final assessment.

Under Florida tax law, the three-year limitations period described in Section 95.091(3)(a), Florida Statutes, can be tolled under certain defined circumstances. For example, under Section 95.091(4), Florida Statutes, the timely commencement of an administrative protest or a judicial proceeding to challenge an assessment tolls the limitations period. Section 95.091(4), Florida Statutes, further states that "protest proceedings" initiated under Section 213.21, Florida Statutes, also tolls the statute of limitations for assessment of taxes.

Section 213.21, Florida Statutes, explains the procedure for initiating informal conferences with the Department and the handling of compromises of tax disputes. Leaving no room for ambiguity, the Florida Legislature linked Section 213.21, Florida Statutes, *directly* to Section 95.091(3)(a), Florida Statutes, through the inclusion of Section 213.21(1)(b), Florida Statutes. Section 213.21(1)(b), Florida Statutes, provides:

> The ***statute of limitations*** upon the issuance of ***final assessments*** shall be tolled during the period in which the taxpayer is engaged in a procedure under this section. (emphasis added).

There exists only **one** Florida statute[3] defining the statute of limitations applicable to assessments of taxes by the Department - Section 95.091(3)(a), Florida Statutes. There can be no serious

[3] As previously noted, Section 95.091(3)(a), Florida Statutes, does provide for very few limited exceptions to this three-year limitations window, but such exceptions are inapplicable to this case.

question that the language contained in Section 213.21(1)(b), Florida Statutes, is referring directly to the statute of limitations to "assess" contained in Section 95.091(3)(a), Florida Statutes. When read in conjunction with Section 95.091(3)(a), Florida Statutes, Section 213.21(1)(b), Florida Statutes, makes evident that the Florida Legislature has defined "assess" to mean "final assessment." In other words, the Department must issue a *final* assessment to a taxpayer within the previously-defined three-year statute of limitations period.

Form DR-831, published by the Department, is in harmony with the intertwined relationship between Section 213.21(1)(b), Florida Statutes, and Section 95.091(3)(a), Florida Statutes, and states as follows:

> If you file an informal written protest, you must file it with the Department no later than [DATE 60 DAYS FROM THE DATE OF THE FORM DR-831], unless you request and receive an extension prior to this date. If you fail to file an informal written protest, the *proposed assessment* will become a FINAL ASSESSMENT on [DATE 60 DAYS FROM THE DATE OF THE FORM DR-831]. (emphasis added)

This language undeniably informs the taxpayer of the sixty day window to file an informal written protest with the Department contained in Section 213.21(1)(b), Florida Statutes. It is nonsensical to suggest the assessment is final or could become final prior to sixty days from its issuance when the statute states only "if you fail to file an informal protest" within sixty days would the assessment become final. Section 213.21(1)(b), Florida Statutes, and Section 95.091(3)(a), Florida Statutes, make clear that the Department must issue a *final* assessment within the defined three-year limitations period. If, as the Department astonishingly suggests, Form DR-831 is an "assessment" for purposes of Section 95.091(3)(a), Florida Statutes, the tolling language contained in Section 213.21(1)(b), Florida Statutes, would be irrelevant. Consistent with the Department's position, the taxpayer's pursuit of an informal conference with

the Department under Section 213.21(1)(b), Florida Statutes, would be ineffectual in tolling the limitations period contained in Section 95.091(3)(a), Florida Statutes, because the Department will have *already issued an assessment to the taxpayer* qualifying under Section 95.091(3)(a), Florida Statutes – *i.e.*, Form DR-831.

As creative as the Department's argument may be, it must fail. A bedrock tenet of Florida law is that a construction of a statute leading to an absurd or unreasonable result or rendering a statute purposeless should be avoided. *See State v. Webb,* 398 So.2d 820 (Fla. 1981). Because the Department's position in this case would render meaningless the tolling language of Section 213.21(1)(b), Florida Statutes, it must be rejected.

The Department issued a Notice of *Proposed* Assessment to VBP with less than sixty days left in the limitations period articulated in Section 95.091(3)(a), Florida Statutes. Form DR-831 expressly states that the *proposed* tax liability thereon does not become a final assessment for sixty days. Section 213.21(1)(b), Florida Statutes, clearly states that the statute of limitations period referred to in Section 95.091(3)(a), Florida Statutes, relates to the issuance of a *final* assessment. By its terms, Form DR-831 issued by the Department to VBP did not become a final assessment in satisfaction of Section 95.091(3)(a), Florida Statutes, until *after* the limitations period agreed to by the parties had expired. There being no dispute in this case concerning the date the Department issued Form DR-831 to VBP, VBP is entitled to summary judgment as a matter of law.

II. The Rules of Statutory Construction Make Clear that a *Proposed* Assessment is Not an "Assessment" for Purposes of Section 95.091(3)(a), Florida Statutes

The applicable rules of statutory construction in Florida are well-settled. When asked to construe taxing statutes, such as at issue in this case, the courts of Florida are resolute that any

ambiguity "must be strictly construed strongly against the government, and liberally in favor of the taxpayer." *State ex rel. Szabo Food Services, Inc. of North Carolina v. Dickinson,* 286 So. 2d 529 (Fla. 1973). The "polestar" of statutory interpretation is legislative intent; however, such intent is derived primarily from the language of the statute. *See State of Florida v. J.M.*, 824 So. 2d 105, 109 (Fla. 2002). When a term is not defined by statute "[o]ne of the most fundamental tenets of statutory construction" requires that a court give a statutory term its "common, ordinary meaning." *Cason v. Florida Dept. of Mgt. Services,* 944 So. 2d 306 (Fla. 2006). However, a statutory interpretation cannot be maintained that would produce an absurd or unfair result. *See Warner v. City of Boca Raton,* 887 So. 2d 1023, 1033 n.9 (Fla. 2004).

The key statutory provision at issue in this case is Section 95.091(3)(a), Florida Statutes, which states in pertinent part as follows:

> 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. (emphasis added)

The term "assess" is nowhere defined for purposes of Section 95.091(3)(a), Florida Statutes.[4]

[4] As argued previously, VBP maintains that the term "final assessment" contained in Section 213.21, Florida Statutes, is interchangeable with the use of the term "assess" in Section 95.091(3)(a), Florida Statutes.

As previously described, the Florida Legislature uses the terms "assessment" and "final assessment" interchangeably in the relevant statutes. *See e.g.*, Section 213.23, Florida Statutes, and Section 95.091(3)(a), Florida Statutes. Thus, the requirement under Section 95.091(3)(a), Florida Statutes, that the Department "assess" a taxpayer must refer to a "final assessment." But even if this court were to disagree with this position, fundamental principles of statutory construction and commonsense require that the term "assess" as used in Section 95.091(3)(a), Florida Statutes, means something other than a "proposed assessment" contained on Form DR-831.

In addition to the lack of guidance under Section 95.091(3)(a), Florida Statutes,[5] the entirety of Chapter 212, Florida Statutes, likewise fails to provide any insight as to either the meaning of the terms "assessment" or "assess" or the procedural significance of receiving a Notice of Proposed Assessment. Because legislative intent cannot be derived from the statutory language, the longstanding rules of statutory construction mandate that the "common, ordinary meaning" of the terms "assessment" and "assess" be explored bearing in mind that any ambiguity must be resolved in favor of VBP.

The common meaning of the term "assess" as used in Section 95.091(3)(a), Florida Statutes, is clear. Section 95.091(3)(a), Florida Statutes, requires that the Department assess the taxpayer within the three-year limitations window. In this context, to satisfy Section 95.091(3)(a), Florida Statutes, the Department must *complete* the requisite act – it must "assess" the taxpayer. Within the meaning of Section 213.23, Florida Statutes, this completed act is formalized by the issuance of an "assessment." With this "common, ordinary meaning" of

[5] Section 213.23, Florida Statutes, outlining certain rules for tolling the general three-year limitations period contained in Section 95.091(3)(a), Florida Statutes, likewise fails to define the term "assessment."

"assess" and "assessment" in mind, it is apparent that a Notice of Proposed Assessment falls woefully short of meeting the mandate of Section 95.091(3)(a), Florida Statutes.

It is a straightforward application of commonsense – to *propose* an act is antithetical to actually *completing* or *accomplishing* the act. In this case, the Department attempts to turn commonsense on its head by arguing that by merely *proposing* the act of assessing VBP it satisfied its statutory obligation to *actually* assess VBP under Section 95.091(3)(a), Florida Statutes. This court should reject this blatant attempt by the Department to defy logic.

Section 95.091(3)(a), Florida Statutes, unequivocally requires that the Department must *complete* the act of assessing a taxpayer within a defined three-year period. Form DR-831 entitled "Notice of *Proposed* Assessment" is clear that it references a taxpayer's *proposed* tax liability. There is nothing ambiguous about the title of the form. The language contained in the body of Form DR-831 is no less unambiguous and makes clear that the calculations on the form reflect a "*proposed* assessment." Specifically, Form DR-831 provides:

> The Notice of Proposed Assessment ("Notice") identifies the deficiency, resulting from an audit of your books and records for the audit period indicated. The Department has previously provided you with schedules of the various transactions supporting the basis for the ***proposed assessment***. (emphasis added)

In the context of outlining the taxpayer's rights to appeal, Form DR-831 again makes clear its status as a *proposed* assessment:

> If you file an informal written protest, you must file it with the Department no later than [DATE 60 DAYS FROM THE DATE OF THE FORM DR-831], unless you request and receive an extension prior to this date. If you fail to file an informal written protest, the ***proposed assessment*** will become a FINAL ASSESSMENT on [DATE 60 DAYS FROM THE DATE OF THE FORM DR-831]. (emphasis added)

Finally, Form DR-831 provides that if "a balance is due and you agree with the *proposed assessment*, please pay the balance due within 60 days of the Notice date." (emphasis added).

The courts of Florida place great weight on the value of "commonsense" in deciding cases. *See e.g., Campus Communications, Inc. v. Dep't of Revenue*, 473 So. 2d 1290 (1985) ("[w]e agree with the trial and district courts that *The Alligator* is a "newspaper" within the common sense meaning of the word); *City of Sarasota v. Mikos*, 374 So. 2d 458 (1979) (concluding that "common sense" dictates that an active use of property by a municipality is not required in order to maintain a tax exemption); *Dep't of Revenue v. Seminole Tribe of Florida*, 65 So. 3d 1094 (Fla. 4th DCA 2011) ("[c]ommon sense suggests that the tax should correspondingly be imposed if the fuel is purchased off the reservation regardless of where it is consumed"). The application of commonsense in this case necessarily leads to the conclusion that when the Department *proposes* to assess a taxpayer it has yet to *actually* assess the taxpayer.

The case of *King v. California Franchise Tax Board*, 961 F.2d 1423 (9th Cir. 1992) supports VBP's position.[6] In *King*, the court was asked whether a "Notice of Proposed Additional Tax" qualified as an "assessment" under the California Tax Code. *Id.* at 1425. Much like Form DR-831, the "Notice of Proposed Additional Tax" issued by the California Franchise Tax Board to the taxpayer stated that it did not become final until sixty days after the mailing of the notice. *Id.* at 1424. The court found that, as is the case under Florida law, the California Tax Code did not define the terms "assess" or "assessment." *Id.* at 1426. After reviewing several relevant dictionary definitions and the similar procedural process for assessment under the Internal Revenue Code, the court held that the "Notice of Proposed Additional Tax" was not an assessment. *Id.* at 1427. In so holding, the court stated the following:

[6] Please find attached hereto as Exhibit C a true and correct copy of the *King* decision.

> [N]otwithstanding the Tax Code's lack of clarity on this question, *it is common sense* that a tax assessment, as a formal act with significant consequences, *cannot occur before it is final.* In California, this final date is no less than 60 days after the issuance of the notice of proposed additional tax. *Prior to this final date, the assessment is best described as a tentative calculation which the taxpayer has no obligation to pay.*

Id. (emphasis added). Although clearly not binding on this court, the holding and rationale articulated by the court in *King* is undeniably persuasive in light of the identity of the issue to be decided and the similarities between the form used by the California Franchise Tax Board (*i.e.*, the "Notice of Proposed Additional Tax") and Form DR-831. The rule of law articulated in King has been relied on by courts in several jurisdictions. *See e.g., In re Proxim Corporation*, 369 B.R. 812 (Bankr. D. Del. 2007) (a proposed assessment notice was not an "assessment" until after a ten-day protest period) and *In re Williams*, 183 B.R. 43 (Bankr. E.D. N.Y. 1995) (holding that a Notice of Determination was not an "assessment" since it provided for a ninety-day protest period).[7]

At bottom, the Department is left in the unenviable position of arguing against the plain language of Form DR-831 and, as a result, commonsense. Even if the Department's argument that a proposed assessment on Form DR-831 satisfies the requirements of Section 95.091(3)(a), Florida Statutes, did not fly in the face of commonsense and had some plausibility, settled principles of statutory construction require that any interpretive ambiguity be resolved against the Department and in favor of VBP. *See State ex rel. Szabo Food Services, Inc. of North Carolina v. Dickinson,* 286 So. 2d 529 (Fla. 1973).

The case of *Florida Export Tobacco v. Dep't of Revenue*, 510 So. 2d 936 (Fla. 1st DCA 1987), relied on by the Department in its Answer, is of no help to this court in deciding this

[7] True and correct copies of the decisions in *In re Proxim Corporation* and *In re Williams* are attached hereto, respectively, as Exhibit D and Exhibit E.

case.[8] In *Florida Export*, the Department issued a letter[9] to the taxpayer in which it was clear that the Department expressly intended the communication to be an assessment. This express intention of the Department was so obvious to the court that there was no substantive discussion in the decision regarding the content of the letter. In this case, the expressed intent of the Department was clear – Form DR-831 reflects a *proposed* assessment, not something that purports to be an "assessment." The express intent is evidenced by the title of the form – Notice of *Proposed* Assessment – and the ubiquitous use of the term "*proposed* assessment" throughout the communication. The Department must not be permitted to argue against the verbiage it chose to use in a form under its sole control. Only if by mailing Form DR-831 the Department intended to issue an assessment – which it did not – would *Florida Export* have any application to this dispute. In addition, the crux of the dispute in *Florida Export* dealt with an entirely different statutory scheme than at issue in this case. Unlike the jurisdictional controversy in *Florida Export*, this case is concerned with the fundamental aspects of tax audit and appeal procedure. For these reasons, *Florida Export* is inapplicable to the case at bar.[10]

III. Statutory Guidance Under Chapter 220, Florida Statutes, Makes Clear That The "Proposed" Deficiency Stated On Form DR-831 Is Not An "Assessment" For Purposes Of Section 95.091(3)(a), Florida Statutes

No guidance exists under Chapter 212, Florida Statutes, defining the terms "assess" or "assessment" or otherwise explaining the procedural aspects of receiving or protesting a Notice of Proposed Assessment. However, ample guidance is found under Chapter 220, Florida Statutes. It is appropriate in this case to look to Chapter 220, Florida Statutes, because the statute

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[8] Please find attached hereto as Exhibit F a true and correct copy of the *Florida Export* decision.

[9] Because the court only referred to the communication as a "letter," it is clear that it was not a Department form.

[10] It is also important to note that the decision in *Florida Export* did not seek to interpret the term "assess" for purposes of setting the limitations period provided under Section 95.091(3)(a), Florida Statutes. In addition, one can safely infer that the disputed communication in the case was clearly not Form DR-831 issued by the Department.

at issue, Section 95.091(3)(a), Florida Statutes, applies equally to assessments of sales and use taxes under Chapter 212, Florida Statutes, and assessments of corporate income taxes under Chapter 220, Florida Statutes. Moreover, the disputed form in this case – Form DR-831 – is used by the Department to notify taxpayer's of "proposed" deficiencies relating to sales and use taxes *and* corporate income taxes.[11] Because there is no procedural difference in the treatment of taxpayers under Chapter 212, Florida Statutes, and Chapter 220, Florida Statutes, it is proper from a tax policy perspective to look to Chapter 220, Florida Statutes, for support. Chapter 220, Florida Statutes, provides definitive guidance regarding the uniform tax procedure relating to both income taxes and sales and use taxes.

Chapter 220, Florida Statutes, is instructive regarding the legislative intent behind the use of the term "assessment" in Section 95.091(3)(a), Florida Statutes. Section 220.709(1), Florida Statutes, states in pertinent part:

> As soon as practicable after a return is filed, the department shall examine it to determine the correct amount of tax. If the department finds that the amount of tax shown on the return is less than the correct amount and the difference is not solely the result of mathematical error, it shall issue a *notice of deficiency* to the taxpayer, setting forth the amount of additional tax and any penalties *proposed* to be assessed. (emphasis added)

The statutory language could not be more clear. As stated in this subsection, after examining a taxpayer's return, the next step in the audit process is for the Department to issue a "notice of deficiency" to the taxpayer. Section 220.709(1), Florida Statutes, is unambiguous that a "notice of deficiency" is not an "assessment." To the contrary, under Section 220.709(1), Florida Statutes, a "notice of deficiency" issued by the Department merely sets forth "the amount of

[11] Compare Exhibit C (the Form DR-831 issued to VBP relating to sales and use taxes under Chapter 212, Florida Statutes) and a redacted copy of a Form DR-831 relating to corporate income taxes attached hereto as Exhibit G.

additional tax and any penalties *proposed* to be assessed." The language of Form DR-831 is consistent with this interpretation and provides:

> The Notice of Proposed Assessment ("Notice") identifies the deficiency, resulting from an audit of your books and records for the audit period indicated. The Department has previously provided you with schedules of the various transactions supporting the basis for the *proposed assessment.* (emphasis added)

Section 220.703(2), Florida Statutes, discusses the procedural importance of receiving a notice of deficiency and states that:

> Whenever a *notice of deficiency* has been issued, the amount of the deficiency *shall be deemed assessed* on the date provided in s. 220.713 if no protest is filed or, if a protest is filed, on the date when the decision of the department with respect to the protest becomes final. (emphasis added)

Reading Section 220.709(1), Florida Statutes, and Section 220.703(2), Florida Statutes, together, it is clearly evident under Florida law that a "proposed assessment" outlined on Form DR-831 is not an "assessment" for purposes of Section 95.091(3)(a), Florida Statutes. Section 220.709(1), Florida Statutes, states that a "notice of deficiency" reflects a "proposed assessment."[12] Under Section 220.703(2), Florida Statutes, the *proposed* tax liability referenced on the "notice of deficiency" is not "deemed assessed" by the Department until (1) the date stated in Section 220.713, Florida Statutes, if the taxpayer does not file a protest or (2) the date the Department's decision ruling on the taxpayer's protest becomes final.

Section 220.713, Florida Statutes, directly addresses whether a "proposed assessment" is an "assessment" for purposes of Section 95.091(3)(a), Florida Statutes and states:

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[12] There are several statutes under Chapter 220 confirming this relationship between a "notice of deficiency" and a "proposed assessment." For example, Section 220.711, Florida Statutes, provides that "[a] notice of deficiency issued under this chapter shall set forth, ... , a computation of the adjustments giving rise to the *proposed assessment* and the reasons or reasons therefore." (emphasis added).

> Upon the expiration of *60 days after the date* on which it was issued (150 days, if the taxpayer is outside the United States), a *notice of deficiency* shall constitute an *assessment* of the amount of tax and penalties specified therein, except for amounts as to which the taxpayer shall have filed a protest with the department under s. 220.717. (emphasis added)

Section 220.713, Florida Statutes outlines the general rule that a proposed assessment reflected on a notice of deficiency "shall constitute an assessment" sixty days after the date of issuance. This statutory language is tracked by Form DR-831 which provides:

> If you file an informal written protest, you must file it with the Department no later than [DATE 60 DAYS FROM THE DATE OF THE FORM DR-831], unless you request and receive an extension prior to this date. If you fail to file an informal written protest, the *proposed assessment* will become a FINAL ASSESSMENT on [DATE 60 DAYS FROM THE DATE OF THE FORM DR-831]. (emphasis added)

As referenced in Section 220.713, Florida Statutes, Section 220.717, Florida Statutes address the situation where a taxpayer protests the proposed tax liability contained on Form DR-831 and provides that:

> (1) Within 60 days (150 days if the taxpayer is outside the United States) after the issuance of a *notice of deficiency*, the taxpayer may file with the department a written protest against the *proposed assessment* in such form as the department may by regulation prescribe, setting forth the portion or portions of the proposed deficiency protested and the grounds on which such protest is based.
>
> (2) Whenever a protest is filed, the department shall reconsider the *proposed assessment*. (emphasis added)

The language used in Section 220.717(1) and (2), Florida Statutes, is substantially identical to the explanation of a taxpayer's protest rights found in Form DR-831 and that found in Rule 12-6.003(1)(b), Florida Administrative Code. Section 220.717(2), Florida Statutes, unambiguously repeats the general theme in Chapter 220, Florida Statutes, confirming that the "proposed

assessment" contained on Form DR-831 is not an "assessment" under Section 95.091(3)(a), Florida Statutes. This language contained on Form DR-831 is consistent with this overarching theme.

VBP's interpretation of Chapter 220, Florida Statutes, is confirmed by the holding in *Florida Department of Revenue v. General Development Corp. (In re General Development Corp.)*, 165 B.R. 691 (S.D. Fla. 1994), *rev'd in part, vacated in part*, 82 F.3d 428 (unpublished opinion) (11th Cir. 1996), *cert. denied*, 519 U.S. 824 (1996).[13] In *General Development*, the court was asked to determine when a corporate income tax assessment is deemed to occur for purposes of the federal bankruptcy code.[14]

The taxpayer was issued a Notice of Proposed Assessment on February 2, 1979. *In re General Development Corporation*, 138 B.R. 128, 129. On March 30, 1979, General Development protested the proposed assessment causing the Department to revise the proposed liability by letter dated January 13, 1981. *Id.* By letter dated March 6, 1981, General Development again appealed the proposed liability. *Id.* After an informal conference, the Department issued a notice of decision dated April 18, 1981. *Id.* On June 18, 1981, General Development filed an action in Leon County Circuit Court challenging the Department's determination that additional corporate income taxes were due. *Id.* Sometime after its filing in this court, General Development filed for Chapter 11 bankruptcy. *Id.* Several years later, on September 28, 1990, the trial court entered a consent judgment liquidating the Department's

[13] The Eleventh Circuit provides by rule that unpublished opinions are not considered binding precedent, but may be cited as persuasive authority. The unpublished opinion of the Eleventh Circuit in *General Development* was included in the appendix of the petition for writ of certiorari to the U.S. Supreme Court (the "Petition"). Please find attached hereto as Exhibit H a true and correct copy of the Petition.

[14] The Eleventh Circuit disagreed with the District Court and followed the reasoning of the Bankruptcy Court. As a result, citations herein refer to the decision of the Bankruptcy Court – *In re General Development Corporation*, 138 B.R. 128 (Bkrtcy.S.D.Fla. 1992). A true and correct copy of the Bankruptcy Court's decision is attached hereto as Exhibit I.

claim to additional corporate income taxes. *Id.* In *General Development*, the court was asked to consider the priority of the Department's claim in the Chapter 11 bankruptcy. Key to the analysis of the priority of the Department's claim was when the taxes were "assessed." *Id.* at 130.

General Development argued that the additional corporate incomes taxes were assessed on the date of the Notice of Decision – April 18, 1981. *Id.* The Department argued that no assessment arose until the taxpayer exhausted all administrative and judicial remedies – September 28, 1990. *Id.* One of the several bases for the court's holding was its reliance on Section 214.03(2), Florida Statutes (1979) (now Section 220.703(2), Florida Statutes), which stated that a "notice of deficiency shall be deemed assessed ... on the date when the decision of the Department with respect to the protest becomes final[.]"[15] *Id.* at 131. The court employed a commonsense reading of Section 214.03(2), Florida Statutes (1979), and concluded that the decision *of the Department* became final on April 18, 1981 on issuance of the Notice of Decision.[16] *Id.* at 132. The procedural relevance of the Notice of Proposed Assessment was not discussed by the court since it did not reflect a final decision of the Department as required by Section 214.03(2), Florida Statutes (1979). The court's analysis and holding in *General Development* are entirely consistent with VBP's interpretation of Chapter 220, Florida Statutes, and, more generally, its position in this case.[17]

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[15] The language of Section 214.03(2), Florida Statutes (1979), is substantively identical to that in current Section 220.703(2), Florida Statutes.

[16] As noted, the decision of the District Court was reversed in part and vacated in part. However, in the published opinion, the District Court dismissed the Department's reliance on the decision in *Florida Export*. *In re General Development Corporation*, 165 B.R. 691, 697. The District Court noted that in *Florida Export* a notice of tax due and demand for payment had been issued while General Development had received no such notice and demand from the Department. *Id.* On this basis, the District Court stated, *Florida Export* was clearly distinguishable. *Id.* A true and correct copy of the District Court's decision is attached hereto as Exhibit J.

[17] In each of *Florida Export* and *General Development*, the Department's consistent position was that an assessment did not occur until a point in time *long after* that argued by the taxpayers. Of particular importance, in *General Development* a "notice of deficiency" was issued to the taxpayer and yet the Department argued that an "assessment" did not arise until any and all judicial appeals were finally decided.

VBP was issued a notice of deficiency on Form DR-831 with respect to a proposed tax liability for sales and use taxes under Chapter 212, Florida Statutes. Chapter 212, Florida Statutes, provides no guidance on when the Department is deemed to have issued an "assessment" under Section 95.091(3)(a), Florida Statutes. However, Chapter 220, Florida Statutes, is clear that Form DR-831 is a "notice of deficiency" meant to reflect a "proposed assessment." Moreover, the content of Form DR-831 tracks the applicable language contained in Chapter 220, Florida Statutes. Because Form DR-831 applies equally to proposed assessments of sales and use and corporate income taxes, the guidance provided by Chapter 220, Florida Statutes, also applies for purposes of Chapter 212, Florida Statutes.

By its express terms, Form DR-831 received by VBP did not become an "assessment" under Chapter 212, Florida Statutes until April 11, 2011 – eleven days *after* the date agreed to in the Extension. Therefore, the resulting assessment on April 11, 2011 is invalid as outside the limitations period provided by Section 95.091(3), Florida Statutes.

V. Neither Section 72.011(2)(a), Florida Statutes, Rule 12-6.003, Florida Administrative Code, Nor the Language of Certain Forms Published by the Department Support the Department's Contention that Form DR-831 is an Assessment as a Matter of Law

The Department cites Section 72.011(2)(a), Florida Statutes, Rule 12-6.003, Florida Administrative Code and the language of certain of its forms in defense of its position that a "proposed assessment" is an "assessment" for purposes of Section 95.091(3), Florida Statutes. However, a careful analysis of each of these arguments demonstrates that the Department's reliance is misplaced.

Section 72.011(2)(a), Florida Statutes, provides in pertinent part:

> An action may not be brought to contest an assessment of any tax, interest, or penalty assessed under a section or chapter specified in

> subsection (1) more than 60 days after the date the assessment becomes final.

The Department contends that Section 72.011(2)(a), Florida Statutes, demonstrates that "an assessment is still an "assessment" even if it is not yet final." Setting aside the confounding nature of this statement, the language of Section 72.011(2)(a), Florida Statutes, cited by the Department provides no insight into the pivotal issue in dispute in this Motion. Specifically, Section 72.011(2)(a), Florida Statutes, fails to provide any insight as to whether Form DR-831 is an "assessment" for purposes of Section 95.091(3), Florida Statutes. It is for this reason that Section 72.011(2)(a), Florida Statutes, can be read in harmony with VBP's position in this case. Under VBP's interpretation, Form DR-831 is a *proposed* assessment. In sixty days, the *proposed* assessment reflected on Form DR-831 becomes an *assessment*. Consistent with the statutory language in Section 72.011(2)(a), Florida Statutes, in sixty days the *assessment* becomes a *final* assessment that must be appealed to the Division of Administrative Hearings or Circuit Court in sixty days.

The Department relies on its own rule as support for the position that Form DR-831 is an "assessment" for purposes of Section 95.091(3), Florida Statutes. The Department argues that Rule 12-6.003, Florida Administrative Code, expressly provides that the terms "Notice of Proposed Assessment" and "assessment" are interchangeable. Rule 12-6.003, Florida Administrative Code provides in pertinent part:

> (1)(a) A taxpayer may secure review of a Notice of Proposed Assessment (Assessment) by implementing the provisions of this section.

In light of this highlighted language, it is no surprise why the Department argues strongly for its consideration. In one solitary parenthetical, by fiat, the Department has chosen to ignore the will of the Florida Legislature as evidenced by Section 213.21, Florida Statutes, and the undeniably

applicable guidance outlined in Chapter 220, Florida Statutes. However, Florida law is clear that the Department cannot implement a rule inconsistent with statutory authority. *See* Section 120.52(8), Florida Statutes, and *Golden West Financial Corporation v. Department of Revenue*, 975 So. 2d 567 (Fla. 2008). In this case, Rule 12-6.003, Florida Administrative Code, is unequivocally inconsistent with the statutory guidance provided by Section 213.21, Florida Statutes and Chapter 220, Florida Statutes.[18]

Finally, the Department references the form language contained in the "Notice of Taxpayer Rights" (the "Notice") attached to the Form DR-1215 (NOI) in defense of its position. The Department highlights the following language from the Notice:

> When the informal conference period expires, you will receive a Notice of Proposed Assessment (NOPA) which provides you with official notice of the amount due and instructions for filing an informal or formal protest.
>
> * * *
>
> You have 60 days from the NOPA date, to file an informal protest.
>
> * * *
>
> If you fail to request an extension or file an informal written protest timely, the proposed assessment will become a *Final Assessment.*

However, this verbiage merely reaffirms VBP's argument that there are only two important concepts in play – a *proposed* assessment and a *final* assessment. The quoted language in the Notice is consistent with VBP's position that the term "assess" used in Section 95.091(3), Florida Statutes, is defined under Section 213.21, Florida Statutes, to mean "final assessment."

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[18] A further problem with the Department's position is that Form DR-831 unmistakably characterizes itself as a "proposed assessment" without any direct or indirect clue that the terms "proposed assessment" and "assessment" are transposable. Unlike the language contained in Rule 12-6.003, Florida Administrative Code, in Form DR-831 there is no such reference – parenthetical or otherwise – to the Notice of *Proposed* Assessment being an "assessment." In fact, in the introductory paragraph of the Form DR-831 it states "[T]he Notice of Proposed Assessment ("Notice") sets forth the following deficiency[.]" In light of the language used in the rule, one would think the Department would want to make clear the procedural importance of Form DR-831.

The Department erroneously contends that Count One of VBP's Amended Complaint is contradicted by the attached exhibits. In its Answer, the Department boldly states that Count One of the Amended Complaint is inconsistent with the language of the Notice because VBP maintained that the Department "had to issue a "final assessment" by March 31, 2011[.]" The purported inconsistency apparently lies with the reference in the Notice that the proposed assessment *becomes* a final assessment versus VBP's claim that the Department was required to *issue* a final assessment. The fatal problem with the Department's position is that it is refuted by the express language of Count One of the Amended Complaint. Nowhere in Count One of the Complaint does VBP argue that the Department is required to *issue* a final assessment by a certain date. To the contrary, in each of paragraph 58, 59 and 60 of Count One of the Amended Complaint VBP alleges that a proposed assessment (or NOPA) does not become an assessment until sixty days after the date contained on Form DR-831. The Department's position is specious and must be rejected.

CONCLUSION

VBP can prevail on its Motion for Summary Judgment under one of three alternative arguments. First, Section 213.21(1)(b), Florida Statutes, is clear that a Notice of *Proposed* Assessment has no effect on the statute of limitations outlined in Section 95.091(3)(a), Florida Statutes,. Second, employing the longstanding rules of statutory construction, the "common, ordinary meaning" of term "assess" and "assessment" compel the conclusion that the issuance of a *proposed* assessment fails to satisfy the limitations requirements of Section 95.091(3)(a), Florida Statutes. Lastly, statutory guidance under Chapter 220, Florida Statutes, applies in this case making clear that a *proposed* assessment is not an *assessment* under Section 95.091(3)(a),

Florida Statutes. The affirmative defenses raised by the Department miss the mark and do not preclude the grant of VBP's Motion for Summary Judgment.

WHEREFORE, VBP moves the court to enter an order invalidating the Department's assessment of VBP as time-barred under Section 95.091(3)(a), Florida Statutes, because the Department failed to issue Form DR-831 to VBP with sufficient time left in applicable limitations window.

DATED this 14th day of February, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have this day forwarded *via* e-mail and U.S. Mail a true and correct copy of the foregoing *Plaintiff's Motion and Incorporated Memorandum of Law in Support of its Motion for Summary Judgment* to the following:

Timothy E. Dennis, Esq.
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THIS the 14th day of February, 2012.

Michael J. Bowen