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

VERIZON BUSINESS PURCHASING, LLC
a foreign limited liability company,

Plaintiff,

vs.

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

Defendant.
_____/

CASE NO.: 2011 CA 1498

DIVISION: Civil

PLAINTIFF'S REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT

Verizon Business Purchasing, LLC, ("Verizon") through its undersigned attorneys, herein replies and responds in opposition to the filing of the Defendant, Florida Department of Revenue (the "Department") responding to Verizon's Motion for Summary Judgment and cross-moving this court for summary judgment on Count One of Verizon's First Amended Complaint and states as follows:

INTRODUCTION

The Department's Reply and Cross Motion is littered with claims that Verizon's arguments are inconsistent, illogical or otherwise promote superfluous interpretations of existing statutes and Department rules. In this regard, the Department's efforts appear designed to distract this Court from focusing on the fundamental issue in dispute in this case – i.e., what does it mean to "assess" a taxpayer under Section 95.091(3), Florida Statutes. This case really is that simple.

The simplicity of the issue in this case is matched only by the straightforwardness of the relevant facts. On or about August 6, 2010, the Department and Verizon agreed to extend the time in which the Department was required to issue an "assessment" to Verizon under Chapter 212, Florida Statutes, until March 31, 2011. On February 8, 2011, the Department issued a Form DR-831 – Notice of Proposed Assessment ("NOPA") – to Verizon referencing a purported sales and use tax liability under Chapter 212, Florida Statutes. By its terms, the NOPA issued to Verizon provided for a sixty day period within which Verizon could maintain an administrative appeal. The NOPA further stated that if no administrative appeal was pursued, the proposed liability would become final (no further administrative appeal rights). Verizon did not seek an informal protest within sixty days of receiving the NOPA. The NOPA became "final" on April 11, 2011 – eleven days *after* the mutually agreed upon date for "assessment" of March 31, 2011. Because the tax liability stated in the NOPA did not become "final" until after the expiration of the extended statute of limitations, Verizon contends that the Department failed to timely "assess" as required by Section 95.091(3).

Verizon's contention in its Motion relating to Count One of the First Amended Complaint is that an "assessment" necessarily reflects ***finality***. The express terms of the NOPA leave no doubt that it lacks the requisite finality to be considered an "assessment" for purposes of Section 95.091(3), Florida Statutes. The Department's strategy in this case is to direct this court's attention in as many directions as possible in an effort to obscure the issue in controversy. However, once the smoke has cleared, this court will be left with unavoidable conclusion that the NOPA is itself not an "assessment" under Section 95.091(3) and, therefore, the Department failed to timely assess Verizon as a matter of law.

I. Verizon's Interpretation of Section 213.21, Florida Statutes, is Entirely Consistent and Does Not Lead to Absurd Results

Florida law promotes informal resolution of tax disputes by permitting a taxpayer to pursue informal administrative appeals. *See* Section 213.21(1)(a), Florida Statutes. The Department argues that Verizon's interpretation of Section 213.21, Florida Statutes, leads to absurd results because the Legislature intended such informal administrative appeals to follow an "assessment". However, the Department's position is at odds with the express language of the statute.

Section 213.21, Florida Statutes, provides as follows:

> (1)(a) The Department of Revenue may adopt rules for establishing informal conference procedures within the department for resolution of disputes relating to assessment of taxes, interest, and penalties and the denial of refunds, and for informal hearings under ss. 120.569 and 120.57(2).
>
> (b) ***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.

Section 213.21(1)(b) refers to a tolling of statute of limitations for issuing a "final assessment". There is only one statute of limitations under Florida law. As a result, there can be no serious question that Section 213.21(1)(b) directly refers to the statute of limitations for issuing an "assessment" under Section 95.091(3), Florida Statutes. Because of this link, it is apparent that the Legislature considered the terms "assessment" and "final assessment". There can be no other explanation for the use of the term "final assessment" in Section 213.21(1)(b), Florida Statutes. The language in the NOPA is also entirely consistent with Verizon's interpretation of Section 213.21, Florida Statutes.

There is only one "act" of any importance regarding the determination of tax liability – the "assessment". Either you have an assessment or you do not. Before an assessment occurs,

you only have a proposed or tentative assessment. Only when the proposed or tentative tax determination is finalized would you have an "assessment".

The Department's claim that Verizon's position is inconsistent with Section 213.21, Florida Statutes, is premised on their characterization of the NOPA as an "assessment". However, if the NOPA were an "assessment", there would be no need to toll the statute of limitations for issuing an assessment under Section 95.091(3), Florida Statutes as provided by Section 213.21(1)(b), Florida Statutes.

Verizon's position is that the NOPA, as it name makes abundantly clear, merely reflects a tentative or proposed assessment. In other words, the issuance of the NOPA precedes the definitive act of "assessing" the taxpayer under Section 95.091(3), Florida Statutes. This interpretation must be correct otherwise there would be no need for tolling the issuance of the assessment under Section 213.21, Florida Statutes for the period during which the taxpayer is engaged in an informal conference procedure. Verizon's position on this point of law is irrefutable and, as a result, the Department's purported assessment of Verizon is invalid as a matter of law.

II. Chapter 220, Florida Statutes, Leaves No Ambiguity that a NOPA Fails to Qualify as an "Assessment" under Section 95.091(3), Florida Statutes

The Department and Verizon are in agreement that no guidance exists under Chapter 212, Florida Statutes, relating to the definition of "assess" for purposes of Section 95.091(3), Florida Statutes, or, more specifically, regarding the procedural significance of receiving a NOPA. However, Chapter 220, Florida Statutes, contains numerous statutory provisions explaining Florida tax procedure in great detail. In its Motion, Verizon asks this court to consider the applicable procedural guidance under Chapter 220, Florida Statutes, in deciding this case relating to Chapter 212, Florida Statutes. It is important to note, the Department does ***not*** contradict

Verizon's interpretation of Chapter 220, Florida Statutes. Instead, the Department's efforts are directed at simply making the case that Chapter 220, Florida Statutes, dealing with corporate income taxes, is inapplicable to this dispute relating to a purported assessment under Chapter 212, Florida Statutes. While Verizon could see some merit in the Department's position if Chapter 220, Florida Statutes, were being looked to for purposes of interpreting a unique taxing provision in the sales and use tax laws of Chapter 212, Florida Statutes, the Department's argument misses the mark as this case deals solely with tax procedure.

The discussion of tax procedure in Chapter 220, Florida Statutes, is unequivocal that a NOPA is a "proposed assessment" lacking the finality of an "assessment" for statute of limitations purposes. In fact, the language used by the Department in the NOPA tracks the statutory language contained in Chapter 220, Florida Statutes. In light of this apparent harmony, it is not unexpected that the Department would attempt to distinguish this case as arising from a purported assessment under Chapter 212, Florida Statutes.

Consider the statutory language of Section 220.717, Florida Statutes, which provides in pertinent part:

> (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)

This quoted language makes clear that a notice of deficiency is a proposed assessment. Closing the loop, the NOPA refers to itself as a notice of deficiency when it states in the lead paragraph – "[T]he Notice of Proposed Assessment ("Notice") identifies the *deficiency*, resulting from an

audit of your books and records for the audit period indicated." Section 220.717, Florida Statutes, also ties nicely with Section 213.21(1)(a) as it refers to informal protests by a taxpayer requiring a reconsideration of the proposed assessment.

The Department has two arguments relating to Verizon's reliance on Chapter 220, Florida Statutes, for an assessment issued under Chapter 212, Florida Statutes. First, the Department contends that relying on Chapter 220, Florida Statutes, would cause the court to read additional requirements into the applicable body of law already in existence under Chapter 212, Florida Statutes. Second, the Department appears to argue that the differences in taxation between corporate income taxes under Chapter 220, Florida Statutes, and sales and use taxes under Chapter 212, Florida Statutes, preclude any such reliance. Neither of these arguments pose an obstacle to the unavoidable conclusion that the procedural guidance contained in Chapter 220, Florida Statutes, applies to Chapter 212, Florida Statutes.

It is incorrect for the Department to argue that looking to Chapter 220, Florida Statutes, requires this court to read additional requirements into the body of law referenced in Chapter 212, Florida Statutes. As previously stated, both parties readily acknowledge that Chapter 212, Florida Statutes, contains ***absolutely no guidance*** applicable to the resolution of this dispute. As a result, relying on the unambiguous guidance in Chapter 220, Florida Statutes, to conclude when an "assessment" occurs under Section 95.091(3), Florida Statutes could not possibly read additional requirements into an existing body of law contained in Chapter 212, Florida Statutes. Where no authority exists under Chapter 212, Florida Statutes, it makes sense to look to applicable guidance in Chapter 220, Florida Statutes.

Addressing the Department's second argument, any differences that may exist relating to the fundamental aspects of corporate taxation under Chapter 220, Florida Statutes, versus sales

and use taxation under Chapter 212, Florida Statutes, is irrelevant as to whether the provisions relating to tax procedure contained in Chapter 220, Florida Statutes, apply to Chapter 212, Florida Statutes. It is immaterial that Chapter 220, Florida Statutes, is tied to the Internal Revenue Code where Chapter 212, Florida Statutes, is not for purposes of determining a taxing scheme. Any differences in the form of taxation do not mandate a different set of procedural rules for resolving tax disputes. To this point, the Department does not argue the differences in the taxing schemes necessitates a different procedural process.

There exists only one statute of limitations for "assessment" applicable to both Chapter 220, Florida Statutes, and Chapter 212, Florida Statutes. Further, the Department uses a NOPA to communicate purported assessments to taxpayers under ***both*** Chapter 220, Florida Statutes, and Chapter 212, Florida Statutes. The Department has failed to articulate one compelling reason why the clear statutory authority under Chapter 220, Florida Statutes, should not apply to disputes under Chapter 212, Florida Statutes, in light of this procedural similarity.

The Department's position with respect to Chapter 220, Florida Statutes, would provide for certain perplexing results. Corporation A is under audit for corporate income taxes (Chapter 220, Florida Statutes) and sales and use taxes (Chapter 212, Florida Statutes). The same limitations period for assessment – Section 95.091(3), Florida Statutes – applies to both audits. The Department issues a separate NOPA (same form – Form DR-831) with respect to each audit. Under the Department's position in this case, the NOPA issued to Corporation A with respect to the sales and use tax audit under Chapter 212, Florida Statutes, would be an "assessment" under Section 95.091(3), Florida Statutes. However, the NOPA issued by the Department to Corporation A relating to the corporate income tax audit under Chapter 220, Florida Statutes, would not be an assessment under the same statute – Section 95.091(3), Florida Statutes. The

only perceivable procedural difference in the two audits would be that the NOPA for one references Chapter 220, Florida Statutes, while the other references Chapter 212, Florida Statutes. In sum, the Department's position on this point unquestionably leads to absurd results.

The Department has failed to articulate any valid reason not to look to the unambiguous guidance in Chapter 220, Florida Statutes, in interpreting Chapter 212, Florida Statutes. Because Chapter 220, Florida Statutes, is clear that a NOPA is not an "assessment" under Section 95.091(3), Florida Statutes, the Department's purported assessment of Verizon under Chapter 212, Florida Statutes, is invalid as a matter of law.

III. The Department Mistakenly Relies on *Florida Export* to Resolve the Fundamental Issue in Dispute in this Case

Although on its face the holding in *Florida Export Tobacco v. Dep't of Revenue*, 510 So. 2d 936 (Fla. 1st DCA 1987) appears relevant to this dispute, a closer look reveals its limited significance. In *Florida Export*, the Department issued a "letter" to the taxpayer that was deemed an assessment. As the Department appears to admit, the correspondence in dispute in *Florida Export* was not a NOPA. This fact is important because the crux of ***this*** case is whether the NOPA issued to Verizon qualified as an "assessment" under Section 95.091(3). Thus, regardless of *Florida Export*, a NOPA cannot be an "assessment" because the title of the form admits that it is only a "*proposed* assessment".

The court in *Florida Export* outlined a two-part test for determining the existence of an "assessment". Under *Florida Export* a taxpayer is in receipt of an "assessment" when the correspondence reflects (1) a notice of tax due and (2) a demand for payment. A NOPA meets neither of these two requirements. Despite the language used in the form, a NOPA cannot be an "assessment" because it fails to communicate that the tax liability referenced therein is "due". Put simply, if, as in the case of the NOPA, a taxpayer has available administrative appeal

options, taxes are not – and cannot be – "due". Taxes would only be "due" once any and all administrative remedies have been exhausted. Further, and whether or not the NOPA communicates taxes "due", the NOPA does not reflect a "demand for payment." Again, if a taxpayer has available certain administrative appeals, there can be no demand for payment. It does not follow that because the NOPA contains a remittance coupon it makes a demand for payment. A taxpayer is under no obligation to make a payment on receipt of the NOPA. By its terms the taxpayer is only asked to make a payment where there is agreement that amounts are in fact due. For these reasons, the NOPA's remittance coupon falls woefully short of being a demand for payment. The Department has incorrectly relied on *Florida Export* because neither the specific or general holding are applicable in this case.

IV. The Extension Agreements Failed to Toll the Running of the Statute of Limitations Under Section 95.091(3)

As an alternative argument, the Department contends that even if the NOPA issued to Verizon was not an "assessment" for purposes of Section 95.091(3), Florida Statutes, there would be no effect on the purported assessment because the Extension Agreements entered into by the parties tolled the relevant statute of limitations window. This argument must fail in light of the statutory authority supporting such consent agreements and the express language of the consent agreements themselves.

What the Department fails to grasp in taking this position is that there is a definitive difference between a *tolling* and an *extension* of the applicable statute of limitations. To "toll" the limitations period, is to freeze it at a specific point in time. In other words, if twenty days remain in the limitations window and the period is tolled – for example, as a result of an informal proceeding under Section 213.21, Florida Statutes – then twenty days will remain in the limitations window once the tolling is lifted. By contrast, an "extension" of the limitations

window extends an existing limitations deadline. For example, if the limitations window with twenty days remaining is extended for an additional thirty days, the Department would then be required to issue an assessment within the newly-extended fifty day window. Form DR-872 – Consent to *Extend* the Time to Issue an Assessment or to File a Claim for Refund – reflects an *extension* – not a tolling – of the applicable statute of limitations under Section 95.091(3), Florida Statutes.

The language contained in the Form DR-872 is consistent with its purpose (and title) as an *extension* agreement. The table referenced on the form outlines the existing limitations expiration date and the "New SOL Expiration Date" after taking into account the agreed extension of time. The statutory authority for the Form DR-872 is Section 213.23(1), Florida Statutes, which states "[T]he executive director of the department or his or her designee may enter into agreements with taxpayers which *extend* the period during which an assessment may be issued..." (emphasis added). This language is quoted verbatim at the bottom of the form DR-872. If the Legislature had intended for the limitations window to be "tolled" through the execution of a Form DR-872, it knew how to express its intent. *See* Section 213.21(1)(b), Florida Statutes (referencing a tolling of the statute of limitations).

For the same reasons articulated above, the Department's claim that a late assessment in this case would only bar the first month of the audit period must fail. Again, the consent agreements are prepared under the authority of Section 213.23(1), Florida Statutes, which provides for extensions of limitations periods – not a tolling. As such, the Form DR-872 – Consent to *Extend* the Time to Issue an Assessment or to File a Claim for Refund – could not toll the limitations period with respect to any monthly return filing. The Department again confuses the concepts of extending and tolling a limitations window.

Because the consent agreements failed to toll the limitations period applicable to the Department's assessment of Verizon, the Department's alternative argument must fail.

V. The Holdings in *King*, *In re Proxim*, and *In re Williams* are Directly Applicable to the Issue in Dispute in this Case

Given the lack of authority under Florida law, Verizon cited three cases addressing the crux of the dispute in this case – the point in time when an "assessment" occurs for tax purposes. The three cases cited by Verizon were *King v. California Franchise Tax Board*, 961 F.2d 1423 (9th Cir. 1992), *In re Proxim Corporation*, 369 B.R. 812 (Bankr. D. Del. 2007) and *In re Williams*, 183 B.R. 43 (Bankr. E.D. N.Y. 1995). The Department dismisses each of these cases because they dealt with cases in bankruptcy. However, this factual distinction is not a bar to their persuasive authority in this case.

Verizon does not dispute that *King*, *In re Proxim* and *In re Williams* each related to bankruptcy proceedings. However, a closer look at the required analysis by the courts in these cases make clear that the definitive issue for review was the definition of a tax "assessment" under local law. Each of these cases involved a two-step process. First, the court determined what an "assessment" was under applicable local law. Once this conclusion of law had been decided, the court then applied this finding to resolve the outstanding disputes in the bankruptcy proceedings.

King is an excellent example of this two-step process. The opening sentence of the opinion is definitive of the primary and subsidiary issues to be resolved in the case:

> [T]his case poses the question when California "assesses" an income tax deficiency, for purposes of rendering the assessment dischargeable in bankruptcy.

King, 961 F.2d at 1424. Put simply, the court needed to resolve the "assessment" question under California (state) law before it could address the separate issue of whether the assessment could

be discharged under the bankruptcy (federal) law. Two different bodies of law requiring separate analyses. *In re Proxim* and *In re Williams* mirror the deliberative process in King and cite to the holding in King that an "assessment" must be ***final***.

While Verizon recognizes that *King*, *In re Proxim* and *In re Williams* are not binding on this Court, it is incorrect to dismiss the holdings in these cases based on the fact that each ultimately resolved an issue in a bankruptcy proceeding. In each case, the court concluded that for a tax liability to be an "assessment" it must be final. In *King*, the court concluded that a "notice of proposed deficiency assessment" providing for a sixty day window to pursue an administrative appeal was not final and, therefore, not an assessment under local law. The NOPA is substantially identical in form to the procedural description of the "notice of proposed deficiency assessment" in *King*.

This Court should look to the decisions in *King*, *In re Proxim* and *In re Williams*, courts from three different jurisdictions, as persuasive authority in resolving the issue in dispute in this case. The fact that the ultimate issue in each of these cases related to bankruptcy (federal) law is not a sufficient reason to discount their relevance.

VI. Section 72.011, Florida Statutes, is Not an Obstacle to a Grant of Summary Judgment in Favor of Verizon

The Department maintains that Section 72.011, Florida Statutes, provides that "'assessments' exist that are not yet final." In support of its position the Department highlights the following language contained in Section 72.011, Florida Statutes:

> An action may not be brought to contest an assessment of any tax, interest, or penalty ... more than 60 days after the date the assessment becomes final.

Verizon contends that there cannot be "assessments" *and* "final assessments" for purposes of Section 95.091(3), Florida Statutes. As argued by Verizon, the term "assess" as used in Section 95.091(3), Florida Statutes, necessarily requires finality. As such, using the phrase "final assessment" is redundant – akin to saying the final, final assessment. There is only one "assessment". Further to the point, the act of assessing under Section 95.091(3), Florida Statutes, can only exist at one point in time. Anything *preceding* the "assessment" can only be tentative or proposed – as the Notice of ***Proposed*** Assessment (NOPA) makes clear. Likewise, nothing of procedural significance under Section 95.091(3) can occur *after* the "assessment" has been issued.

It is important to note, Section 72.011, Florida Statutes, says nothing about when an "assessment" occurs pursuant to Section 95.091(3), Florida Statutes. For example, Section 72.011, Florida Statutes, provides no insight into the procedural significance of a NOPA. As such, Section 72.011, Florida Statutes, is of no assistance to this Court in determining when the Department has "assessed" a taxpayer for purposes of Section 95.091(3), Florida Statutes.

CONCLUSION

Nothing is more fundamental to our tax laws than the statute of limitations on assessment. An "assessment" necessarily requires finality. This conclusion is what Section 213.21, Florida Statutes, Chapter 220, Florida Statutes, applicable judicial decisions from various jurisdictions and common sense all require.

In this case, the Department was required to issue an "assessment" under Section 95.091(3), Florida Statutes, to Verizon before March 31, 2011. On February 8, 2011, the Department issued a NOPA to Verizon outlining a proposed liability for sales and use taxes. Under the express terms of the NOPA, Verizon had sixty days – until April 11, 2011 – to pursue

an informal protest of the proposed sales and use tax liability. As such, the proposed liability in the NOPA did not become final until April 11, 2011 – eleven days after the statute of limitations window expired on March 31, 2011. Because the NOPA issued to Verizon was not an "assessment" for purposes of Section 95.091, Florida Statutes, the Department's purported assessment of Verizon is invalid as a matter of law.

WHEREFORE, Verizon requests that this Court enter an order:

(1) granting Verizon's Motion for Summary Judgment on Count One of the First Amended Complaint;

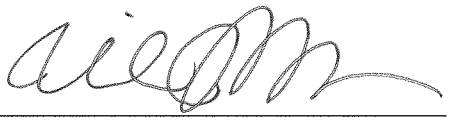
(2) invalidating the Department purported assessment of Verizon as time-barred under Section 95.091(3), Florida Statutes;

(3) denying the Department's cross-motion for summary judgment on Count One of Verizon's First Amended Complaint:

(4) granting such other relief as deemed appropriate.

Respectfully submitted,

Dated: April 20, 2012

By: 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a true and correct copy of the foregoing to be served by regular U.S. mail, first class postage prepaid, addressed to:

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on this 20th day of April, 2012.

Michael J. Bowen