

The 26th Annual Tax Conference
State Tax Matters

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LINKEDIN GROUP DEDICATED TO
FLORIDA TAX MATTERS



CURRENT FLORIDA TAX NEWS, LEGISLATION, AND CASES
AGAINST THE FLORIDA DEPARTMENT OF REVENUE

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Client Question

- Business is not paying its bills on time
- What Should client do?
- Your advice

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- Theft of State Tax Funds

– 0 to \$300	1 st Degree misdemeanor
– \$301 to \$20,000	3 rd Degree Felony
– \$20,001 to \$100,000	2 nd Degree Felony
– \$100,001 and up	1 st Degree Felony

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- DOR effort is on "Taxpayer Education"
- Times are "Tough" at the DOR
- The DOR is Lean & "Mean"

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DOR Terminology

- "Taxpayer Education" = Audits
- "Tough" = Collections
- "Mean" = Criminal Investigations

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Types of Audits

- **Letter audit** - usually about a specific transaction or issue (e.g. purchase of a boat or intercompany rent)
- **Self Assessment Request** - like performing surgery on yourself...
- **Office Audit** – full audit of your company, facilities, procedures, and records. Akin to a lobotomy...
- **Criminal Investigation Audit** – you need a lawyer

FLORIDA INDUSTRIES TARGETED BY THE FLORIDA DOR

- ALCOHOL & TOBACCO RETAIL
- USED CAR DEALERS
- RELATED PARTY REAL ESTATE RENTAL
- FABRICATION BY REAL PROPERTY CONTRACTORS
- VoIP COMPANIES (Comm. Service Tax)
- ON THE RADAR – Virtual Private Networks

Alcohol and Tobacco Audits:

- 2011 Legislative Change requiring ABT distributors to reports sales to DOR
- Beginning of 2012, audit notices distributed
Large Under-reporting
- Potential Criminal Liability
- DOR Tracks audits after notice with average 67% increase in sales tax reported within 3 months

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AREAS OF FL DOR FOCUS

- Used Car Dealers
 - DMV records compared to sale tax returns
 - Out of state sales a big problem area

AREAS OF FL DOR FOCUS

- Real Property Rentals
 - Related Party Leases
 - Salano V DOR
 - TAA's 2004 – 2006 – Timming & Amounts
 - US Cardio Vascular V DOR (2009)

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AREAS OF FL DOR FOCUS

- Real Property Fabrication Contractors:
 - Materials, labor, & overhead out the door
 - Cabinets, Countertops, Elevators, etc

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AREAS OF FL DOR FOCUS

- Voice over IP (VoIP)
 - Industry contends internet access is tax free under Internet Tax Freedom Act
 - FL DOR – Communication service subject to the Communication Services Tax (18%+)
 - Auditing every VoIP in the state...

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AREAS OF FL DOR FOCUS

- Virtual Private Networks
 - Franchise industries e.g. hotels, restaurants
 - Secure private networks for communicating sales, reservations, etc.
 - FL DOR contends these are communication services subject to Communication Services Tax

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Audits & Protests

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COMPLIANCE, ENFORCEMENT, & AUDIT PROCEDURES

- Formal Start of the Audit
 - Form DR-840 – Notice of Intent to Audit Books and Records
- How/Why Was I Selected?
 - Computer Random Selection
 - Focus on Businesses in a Specific Industry
 - Because of an Internal Revenue Service Audit
 - Information Sharing with Other State Agencies
 - Outcome of a Prior Audit
 - Audit of a Customer or Supplier
 - Business publications, periodicals, journals, etc.
 - Someone turned you in through the Reward Program
- How Far Back Can the Audit Go? – 3 Years

DON'T PANIC!

- Who is going to handle the audit?
 - In-house accounting department?
 - Outside accounting firm?
 - Legal Counsel?
- What Exposure Do you Have?
 - Policies in place to make sure use tax is paid?
 - Do you have a lot of exempt sales? (Paperwork?)
 - Do you have intercompany rent?
 - Are you unsure what your exposure might be?
 - These questions affect who should handle the audit.



THE EFFECT OF RECEIVING A DR-840

- SOL IS TOLLED FOR 1 YEAR
- STATE CANNOT FORCE THE AUDIT TO START FOR 60 DAYS (BUT THEY WILL ASK)
- AUDIT MUST START WITHIN 120 DAYS OR TOLLING ENDS (UNLESS DELAY REQUESTED BY TAXPAYER).
- PRE-AUDIT QUESTIONNAIRE AND ELECTRONIC SURVEY – ASKING FOR THE MOON

INITIAL CONTACT WITH AUDITOR (VIA PHONE)

- Form DR-835 - Power of Attorney
- Discuss timing and location of audit
 - Auditor wants the audit to start ASAP (evaluated on number of completed audits during year).
 - Must start audit before 120 days from DR-840
 - If at all possible, DO NOT HAVE THE AUDIT AT YOUR PLACE OF BUSINESS.

THE FIRST AUDITOR MEETING

- **Don't be fooled by the friendly attitude**
 - Wolf in sheep's clothing, but be nice.
 - Lowest paid State auditors in the country
- **Go over the Pre-Audit Questionnaire and Electronic Survey.**
 - If the taxpayer is at the meeting, then the answers will likely be final and a signature is required
 - If only a representative (accountant or lawyer), then one would not be expected to know every answer. "I'll ask the client about that" strategy.
 - The representative does not have to sign the questionnaire on behalf of the client.
- **Discuss what sampling methods might be used**
 - Usually based on industry and available records
 - If you know of a problem area, then tread lightly trying to steer the sample period because it will likely have the opposite affect.

WHAT TO GIVE THE AUDITOR?



WHAT TO GIVE THE AUDITOR?

- **There are many things the auditor is entitled to, so you might as well give them:**
 - Federal Income Tax Returns (at first meeting)
 - Bank Statements (wait for request)
 - Fixed Asset Purchases Invoices (wait for specific request)
 - Real estate rental contracts (wait for specific request)
 - Sales Journal (wait for specific request)
 - Know what the exposure might be before giving the auditor anything!
- **The auditor will ask for an electronic copy of your entire records. Don't do it.**
 - Make the auditor to request very specific items from the books or records, then provide print outs of only that information
 - Otherwise, it is too easy to sort through all your data guessing at what might be taxable and making you provide otherwise. Don't make this easy.

“ARE WE THERE YET”

- For the typical audit, only give the auditor a day or two at a time.
 - This gives you time to find answers/documents
 - This also helps the auditor realize to only focus on the material items if they plan to finish any time soon.
- Ask questions regularly:
 - What items have you found of interest?
 - What are you working on now?
 - Plant the seed of doubt that the items may not be taxable, but don't over argue.
 - My favorites – finished already? So we are getting a refund right?
- Either way – keep a good rapport going with the auditor.

EXTEND THE SOL?

- Complicated sales and use tax audits or audits of big companies can often exceed the 1 year the SOL is tolled by the DR-840.
- Should you sign the DR-872 – Consent to Extend the Time to Issue an Assessment?
 - If you don't sign, then the auditor will likely throw a dart on the wall and guess (high) at what you owe before the SOL runs out. You prove them wrong on Protest.
 - We are usually willing to extend at least once unless there is a concern that has not been noticed yet.
 - Do not extend a year. Extend a two or three months, then reassess.

THE AUDIT ENDS - FINALLY

- The beginning of the end: Form DR-1215 – Notice of Intent to Make Audit Changes
- This is the point many taxpayers have a coronary.
- DON'T PANIC, the tentative tax due is usually much higher than the actual amount due
- Reflected are items that the auditor thinks "might" be taxable.
- Paperwork Game: If you can provide documentation to prove otherwise, then the amounts get removed
- The state will often waive 100% of the penalties
- Gray areas of law – spend very little time on

Anatomy of the DR-1215

- Exhibit A's
 - Exempt Sales
 - Tax collected but not remitted
 - Differences between federal income tax returns and sales tax returns
 - Unexplained bank deposits
- Exhibit B's
 - Fixed Asset Purchases
 - Consumable Items
 - Fabrication
- Each section explains why the auditor thinks that tax may be due.

CONFERENCE WITH THE AUDITOR

- After processing the proposed extortion amount on the DR-1215...
- Schedule a conference with the auditor and the auditor's supervisor to discuss each section. Often they will tell you exactly what they want to make certain items be removed from the audit.
- If the penalties have not already been removed, then ask that the penalties be removed in this conference.
- Remember – if any of the items are legally gray, then don't spend a lot of time on the items. These issues can be addressed on Protest. The auditor level usually does not have the authority to settle gray areas.

NOTICE OF PROPOSED ASSESSMENT

- The Notice of Proposed Assessment is, for all practical purposes, the end of the audit.
- In 60 days, the assessment becomes FINAL ASSESSMENT.
- File a administrative "Protest" within 60 days, or
- Initiate litigation against the Florida Dept. of Revenue within 60 days of the NOPA become final.

DR-831
R. 12/11
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NOTICE OF PROPOSED ASSESSMENT

06/02/2012

FLORIDA
DEPARTMENT
OF REVENUE

C/O LAW OFFICES MOFFA, GAINOR &

Audit Number:
Tax: Sales and Use Tax
ID Number:
Audit Period: 05/01/2008 - 07/31/2011

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.

Assessment Authority: Chapter 212, F.S.

Tax	\$	40,752.07
Penalty	\$	45.84
Penalty - Fraud	\$	0.00
Penalty - Other	\$	0.00
Interest Through 06/02/2012	\$	6,941.84
Total Deficiency	\$	47,739.75
Less: Payment(s)	\$	0.00
Less: Offset(s)	\$	0.00
Balance Due	\$	47,739.75

Plus additional daily interest at 7.75% per day from 06/02/2012, through the payment date. See Page 2, "Addendum to Notice of Proposed Assessment" for explanation of interest rates (if applicable).

If you do not agree with the proposed assessment, you may request a review through one of the following:

- informal protest
- administrative hearing
- judicial proceeding

The enclosed brochure provides you with the procedures for requesting a review.

If you file an **informal written protest**, you must file it with the Department no later than 10/01/2012, 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 10/01/2012.

If you request an **administrative hearing or judicial proceeding**, you must file your request no later than 11/30/2012 or 60 days from the date the assessment becomes a Final Assessment. Florida Statutes mandate this time limit and the Department cannot extend it. You must file the petition for an administrative hearing with the Department of Revenue. For judicial proceedings, you must file a complaint with the appropriate Clerk of the Court.

If a balance is due and you agree with the proposed assessment, please pay the balance due within 60 days from the notice date. Please return your payment in the enclosed envelope and include the NOPA remittance coupon.

The amount shown on this notice may not include: credits, payments, notices of tax action, delinquency notices or other billings previously issued by the Department.

NOTE: If you are protected by Federal Bankruptcy Law, you are not required to pay except as provided by Title 11 United States Code (U.S. Bankruptcy Code).

Refer questions and correspondence to:

Compliance Support Process
P.O. Box 5139
Tallahassee, FL 32314-6139
Phone: 850-617-8555 Fax: 850-245-5961

ADMINISTRATIVE PROTEST

- After the NOPA is issued, you should take the opportunity to file an administrative appeal to the audit assessment.
- This is the first venue where "gray areas of law" can be addressed.
- Compromises can be made (e.g. doubt as to collectability)
- A payment plan can be negotiated
- Do NOT miss your opportunity to whittle away at the assessment on Protest.

PETITION FOR RECONSIDERATION

“If at first you don’t succeed, then try, try again”

- If the protest doesn’t give a just result, file a “PETITION FOR RECONSIDERATION”
 - Effectively another administrative appeal very similar to the protest except you have to allege new facts or arguments.

SALES TAX LITIGATION

- If you can’t resolve the issue during the protest or on a petition for reconsideration, then your only available option is to litigate.

TWO CHOICES:

- Department of Administrative Hearings (DOAH)
- Circuit Court

SALES TAX LITIGATION

Choice 1

Department of Administrative Hearings (DOAH)

- Do not have to “pay to play” (but you must pay any uncontested tax, penalties, and interest)
- All the formalities of a court.
- Final court opinion is a recommendation to the DOR, which the DOR does not technically have to accept.
- Appeal directly to the District Court of Appeals

SALES TAX LITIGATION

Choice 2

Circuit Court (20 courts in Florida)

- Must “pay to play” (but very large company’s often request a waiver of this requirement)
- Attorney required (entity can not be pro-se)
- Binding on DOR and Taxpayer, but can be appealed to the appropriate FL Appellate Court.

- First Circuit - Escambia, Okaloosa, Santa Rosa and Walton
- **Second Circuit** - Franklin, Gadsden, Jefferson, **Leon**, Liberty, and Wakulla
- Third Circuit - Columbia, Dixie, Hamilton, Lafayette, Madison, Suwannee and Taylor
- Fourth Circuit - Clay, Duval and Nassau
- Fifth Circuit - Citrus, Hernando, Lake, Marion and Sumter
- Sixth Circuit - Pasco and Pinellas
- Seventh Circuit - Flagler, Putnam, St. Johns and Volusia,
- Eighth Circuit - Alachua, Baker, Bradford, Gilchrist, Levy, and Union
- Ninth Circuit - Orange and Osceola
- Tenth Circuit - Hardee, Highlands, and Polk
- Eleventh Circuit - Dade
- Twelfth Circuit - DeSoto, Manatee, and Sarasota
- Thirteenth Circuit - Hillsborough
- Fourteenth Circuit - Bay, Calhoun, Gulf, Holmes, Jackson and Washington
- Fifteenth Circuit - Palm Beach
- Sixteenth Circuit - Monroe
- Seventeenth Circuit - Broward
- Eighteenth Circuit - Brevard and Seminole
- Nineteenth Circuit - Indian River, Martin, Okeechobee and St. Lucie
- Twentieth Circuit - Charlotte, Collier, Glades, Hendry and Lee

SALES TAX LITIGATION

- MOST CASES SETTLE BEFORE TRIAL
- IF THERE IS ONLY ONE ISSUE AND NO EXPERT WITNESSES ARE REQUIRED, THEN COST CAN BE VERY REASONABLE
- HAZARDS OF LITIGATION

LITIGATION – MISS DEADLINES?

TECHNICALLY THERE IS REALLY
A THIRD (CREATIVE) CHOICE:
(even after the deadlines)

Pay the tax then file for a refund (effectively
throwing you back to the protest phase).



10 MINUTE BREAK



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Mult-State Tax Matters

- HOW OFTEN DO YOU AS A RESIDENT HEAR FROM THE FLORIDA DEPT. OF REVENUE?
- THIS STORY IS ONE OF THE REASONS WHY...
- DEPT. OF REVENUE -> RAISE MORE REVENUE ON OUT OF STATE PURCHASES

OPERATION FUR COAT

- OHIO FURRIER – SALES AND USE TAX AUDIT
- NEVER FILED A SALES TAX RETURN – SO... SOL
- THREATENED WITH BIG ASSESSMENTS, UNLESS
- LETTER FROM YOUR FRIENDS AT THE FL DOR
- WHO OPENS THE MAIL?

A FUR COAT?
BUT I DIDN'T
GET A ...





Dear Florida Dept. of Revenue,

Thank you for auditing our Ohio facilities.
Due to your hard work at collecting tax, we
had our BEST YEAR EVER with sales to your
state.

PLEASE COME BACK SOON!

Sincerely,

xxxxx, CEO, ABC Fur Company

Collection Analytics

- Quickly track down and seize funds of taxpayers who are delinquent
- Payment Plans or lack thereof

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Revocation

- Revoke the taxpayers sales and use tax registration – preventing sales
 - Informal hearing at local level
 - Formal hearing with attorney general's office
 - Sherriff used to shut down the business

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New Registrations

- Denial of new business registrations
 - Audit, protest, payment plan, late payments
 - Same owner or responsible parties
 - Even purchaser of the business

Can usually be negotiated to allow registration

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CRIMINAL PENALTIES IN FLORIDA SALES TAX

Willful Intent to Defraud the State

- < \$300 – Misdemeanor
- > \$300 < \$20k – 3rd Degree Felony
 - up to 5 years in jail + up to \$5,000 in fines
- > \$20k < \$100k – 2nd Degree Felony
 - up to 15 years in jail + up to \$10,000 in fines
- > \$100k – 1st Degree Felony
 - up to 30 years in jail + up to \$10,000 in fines

See, §212.15(2), F.S.

Criminal Investigations

- NO FOREWARNING – Investigator simply walks in the door and starts asking questions...
- Entire division of the FL DOR dedicated to investigating and referring for prosecution

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CRIMINAL PENALTIES IN FLORIDA SALES TAX

WWW.MYFLORIDA.COM/DOR/

CLICK ON "NEWS RELEASES"

PARTIAL LISTING OF BUSINESS OWNERS
ARRESTED FOR SALES TAX THIS YEAR

CRIMINAL PENALTIES and BANKRUPTCY

- Remember: Bankruptcy will not extinguish the civil taxes, penalties, and interest.
- Furthermore: Criminal Liability survives bankruptcy and has a 5 year SOL
- But proper planning in Bankruptcy can be a great defense in criminal proceedings.

Transferee Liability

Purchase ownership interest OR
substantially all the assets of the business

New owner assumes sales and use tax
liabilities of old business

Transferee Liability

New Law in 2012 – Certificate of Compliance

- The transferee (buyer) receives a certificate of compliance (DOR provided document) from the transferor (seller) showing that the transferor (1) has not received notice of audit, (2) has filed all required tax returns, (3) has paid the tax due from those returns, and (4) there are no insiders in common between the transferor and the transferee; **OR**
- The Department of Revenue conducts an audit, at the request of the transferee or transferor, and finds that the transferor is not liable for any taxes.

See, Sec. 213.758, F.S.

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Assignment for Benefit of Creditors

- Chapter 727 Florida Statutes

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Recent Cases

- Leasehold Improvements – are they rent
- Assessments & statute of limitations issues (NOPA)
- Online Travel Companies (OTC)
- Groupon – no case yet

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Questions?



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The End

- For more information please visit our website at www.FloridaSalesTax.com.

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