

FLORIDA SALES AND USE TAX

James H Sutton, Jr., CPA, Esq.



www.FloridaSalesTax.com
Moffa, Sutton, & Donnini, P.A.
JamesSutton@FloridaSalesTax.com
813-775-2131

James H Sutton, CPA, JD, LLM

JamesSutton@FloridaSalesTax.com

- Florida licensed CPA and Attorney with Big Five CPA firms, law firm and industry experience (20+ years)
- Managing partner of the Tampa law offices of Moffa, Sutton & Donnini, P.A.
- Primary practice area: Florida sales and use tax controversy
- Adjunct Professor of Law at Stetson University College of Law: State and Local Taxation
- Education: BA in Accounting Stetson



Masters in Accounting Mississippi State
JD from Stetson University
LLM in Taxation from University of Florida

LinkedIn Group dedicated to
Florida Tax Matters



Current Florida Tax News, legislation,
and cases against the
Florida Department of Revenue

Florida Sales and Use Tax

- 6% State Sales & Use Tax Rate
- Plus Local Discretionary Surtax .5% to 1.5%
- Any Questions?

FLORIDA SALES & USE TAX

> \$23 billion a year

General Types of Taxable Transactions

- Sale of Tangible Personal Property
- Rental of Tangible Personal Property
- Rental of Real Estate
- Admission
- Taxable Service
 - Nonresidential Cleaning Services
 - Commercial Pest Control Services
 - Commercial/Residential Burglary and Security Services
 - Detective Services
 - Management of Rental Property

FL DOR TAX AUDIT COLLECTIONS HISTORICAL PERSPECTIVE

2000	\$119,892,000	2008	\$82,951,000
2001	\$101,328,000	2009	\$104,345,000
2002	\$123,093,000	2010	\$97,310,000
2003	\$116,064,000	2011	\$123,414,000
2004	\$144,293,000	2012	\$84,651,000
2005	\$81,379,000	2013	\$272,768,705
2006	\$86,199,000	2014	\$208,453,962
2007	\$81,652,000	2015	\$228,407,060

PENALTIES FOR MISTAKES IN FLORIDA SALES TAX

- How many of you handle Florida sales tax for your company or your client's company?
- Did you know that you can become personally liable for sales taxes and/or penalties if something is done wrong?

CIVIL PENALTIES IN FLORIDA SALES TAX

- For example: § 213.29, F.S., provides for a 200% penalty on EACH INDIVIDUAL for failure of any person, Officer, or Director to collect and pay tax or attempt to Evade or Defeat the sales tax.
- § 212.12(2)(C), F.S. imposes a 100% penalty for filing a fraudulent return with willful intent to evade payment.

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 PENALTIES IN FLORIDA SALES TAX

WWW.MYFLORIDA.COM/DOR/

CLICK ON "NEWS RELEASES"

PARTIAL LISTING OF BUSINESS OWNERS ARRESTED
FOR SALES TAX THIS YEAR

(Removed from DOR Website April 2017)

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.

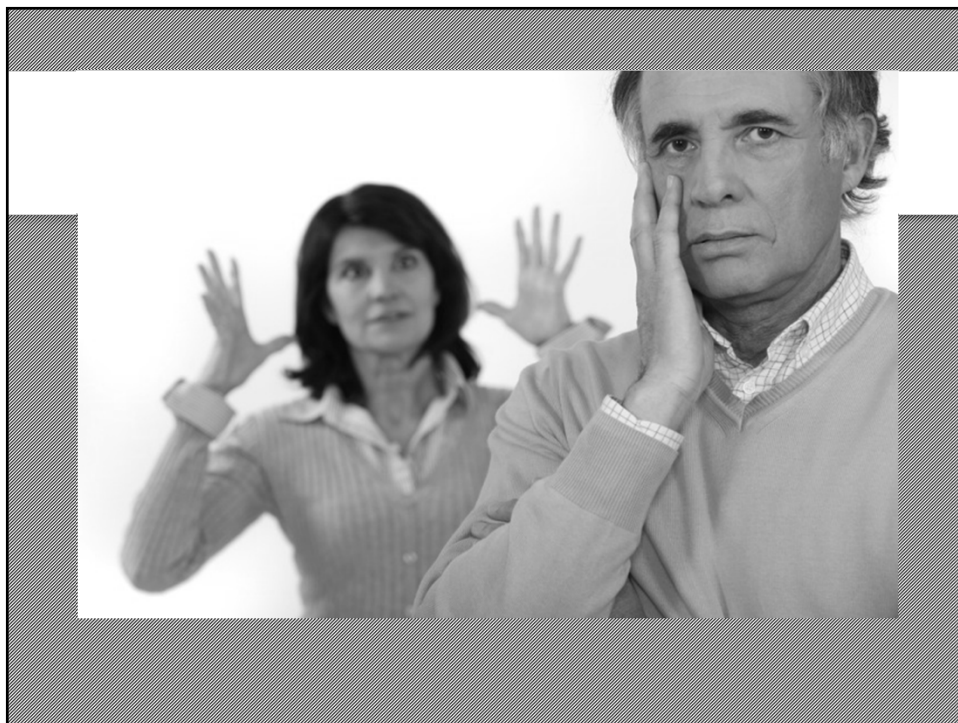
OPERATION FUR COAT

- 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,
xxxxxx, CEO, ABC Fur Company

FL DOR WEAPONS

- GUILTY UNTIL PROVEN INNOCENT AUDITS
- CIVIL PENALTIES ON BUSINESS
- CIVIL PENALTIES ON OWNERS & RESPONSIBLE PARTIES
- REVOCATION OF SALES TAX REGISTRATION
- DENIAL OF NEW REGISTRATIONS
- TRANSFEREE LIABILITY
- CRIMINAL IMPLICATIONS

HOW TO PAY FL USE TAX

Florida Department of Revenue Out-of-State Purchase Return
Do not use this form if you are a registered Florida sales tax dealer or if you purchase an aircraft or boat.

DR-15MO
R. 09/10

Purchases made for quarter ending / (See Quarterly Schedule)

Social Security Number* --

Federal Employer ID No. -

Purchaser's Name _____
(Print or Type)

Address _____

City _____ State _____ ZIP _____

County _____

DOR USE ONLY
--

DR-15MO

DOLLARS | **CENTS**

1. Amount Purchased (Enter total from Schedule of Purchases)	<input type="text"/> , <input type="text"/> , <input type="text"/> . <input type="text"/>
2. Tax (Line 1 x .06)	<input type="text"/> , <input type="text"/> . <input type="text"/>
3. Less Credits (taxes paid)	<input type="text"/> , <input type="text"/> . <input type="text"/>
4. Total Tax Due (Line 2 minus Line 3)	<input type="text"/> , <input type="text"/> . <input type="text"/>
5. Interest	<input type="text"/> , <input type="text"/> . <input type="text"/>
6. Amount Due (Total of Lines 4 and 5)	<input type="text"/> , <input type="text"/> . <input type="text"/>

Or you can file on-line at the DOR's web site
(with the other 30 or so people a year that do).

INDUSTRY SPECIFIC ISSUES

Florida Sales & Use Tax BOATS

- TPP = subject to sales tax
- Surtax capped at \$5,000
- Maximum Tax
 - \$18,000
- Purchased in another State
 - Credit for tax paid
 - 6 month rule

Florida Sales & Use Tax BOATS

Special Rules - Nonresident dealers

1. Must get signed affidavit
2. Must leave Florida within specified time
(rules depending on boat size)
3. Seller must provide copy of invoice, bill of sale, closing statement, & affidavit

Florida Sales & Use Tax MOTOR VEHICLES

- TPP = subject to sales tax
- Surtax capped at \$5,000
- Purchased in another State
 - Credit for tax paid

Florida Sales & Use Tax MOTOR VEHICLES

- DMV has information so heavily audited industry
- Shipped to another state vs. picked up in Florida
 - 1. Shipped to another state = bill of lading
 - 2. Sold to out of state resident = DR-123, other states tax applies
 - 3. Sold to non-resident dealer - Affidavit
- FULL ONE OUR SEMINAR JUST ON CAR DEALERS (FICPA/FIADA)

CONSTRUCTION INDUSTRY A Minefield of Tax Implications

- THE CONSTRUCTION INDUSTRY IS THE 2ND LARGEST INDUSTRY IN THE STATE OF FLORIDA
- AND - PROBABLY THE MOST DANGEROUS AREA OF UNCERTAINTY IN FLORIDA SALES AND USE TAX LAW.

CONSTRUCTION INDUSTRY A Minefield of Tax Implications

- FLORIDA SALES TAX DOES NOT APPLY TO THE IMPROVEMENT TO REAL PROPERTY. THESE TRANSACTIONS ARE SIMPLY OUTSIDE THE SCOPE OF FLORIDA SALES TAX.
- CONSTRUCTION IS ALL ABOUT REAL PROPERTY IMPROVEMENT, SO WHY IS THIS COMPLICATED?
- THE QUESTION TURNS ON WHAT IS A 'REAL PROPERTY IMPROVEMENT'

CONSTRUCTION INDUSTRY

- CALL THE FLORIDA DOR TAX HOTLINE FOR HELP (1-800-352-3671)
- "I'M A CONSTRUCTION CONTRACTOR IN FLORIDA. I PERFORM/ INSTALL WIDGETS. SHOULD I COLLECT SALES TAX FROM MY CUSTOMERS?"



CONSTRUCTION INDUSTRY

- HERE ARE A FEW EXAMPLES THAT WILL SURPRISE YOU:
- Elevator manufacturer / contractors
- Custom home theater contractors
- Heating / air conditioning contractors
- Shutter/Window treatment contractors
- Different Rules for Government Work!!!!

REAL PROPERTY RENTAL

- Transient Rental
- Commercial Rental

HOTEL/VACATION RENTAL

- Amount hotel receives subject to tax (not amount paid to travel websites) (Expedia FL Sp Ct Case)
- All fees paid to hotel contingent on occupancy subject to tax - such as cleaning fees
- State Sales Tax PLUS Local Bed Tax (aka tourist development tax)
- Long Term Rental Exempt if > Six Months
- Exempt Rentals - Need exemption certificate AND proof payment came from exempt entity

COMMERCIAL RENTAL

- > \$2 Billion a Year
- Applies to Intercompany Rent
- Constructive Rent
- Planning opportunities
 - No requirement for FMV
 - No requirement for Rent at all
 - Auditors will look for rent...
- Potential to lower tax rate...

MANUFACTURING

- Florida Legislature Loves Manufacturers!
- Manufacture, Fabricate, Process, Compound, or Produce Tangible Personal Property
- Equipment & Machinery Exemptions
 - New Business (purchased prior to production)
 - Expanding Business (10% increase in production)
 - 5% increase Jan. 1, 2013 (212.08(5)(b), F.S.)
 - 0% increase effective April 30, 2014 (212.08(7)(kkk), F.S.)
 - Pollution Control Equipment (212.051, F.S.)
 - Research & Development Equipment (212.08(18), F.S.)
 - Repairs to Equipment in most industries (212.08(7), F.S.)

Services subject to sales tax: Taxable and Possibly Taxable Services

- Who can name what is and is not taxable in FL?
 - Nonresidential Cleaning Services
 - Commercial Pest Control Services
 - Commercial/ Residential Burglary and Security Services
 - Detective Services
 - Real Estate Management Services (rentals)
- Communication Services Tax (up to 18.7%)
 - Telephone Services
 - Paging Services
 - Faxing Services
 - Video Conferencing Services
 - Video Services
 - Direct to Home Satellite Services

Exempt Transactions

- 3 Types
 - 1- The product is exempt
 - 2- The sale to an entity makes it exempt
 - Big 3: Religious Institutions, 501 (c) (3)'s, Schools
 - 3- The purpose of the transaction makes it exempt
 - Sale for resale

New Rules on Exempt Customers

- Section 212.08, F.S. requires payments from exempt customers to be paid by the exempt entity.
- Revised Rule 12A-1.038 (January 2016) - Finally enforces this requirement
 - Funds must come from exempt entity
 - New Record Keeping Requirements (forms)
 - Hotels have been enforced for years
 - Now being enforced on ALL TYPES OF BUSINESSES

Are Shipping Charges Taxable?

- It Depends:
 - Is the shipping optional?
 - Does the customer take title prior to shipping (FOB Shipping point)?
 - Does the customer arrange for shipping?
 - Remember Pizza Hut/Papa John's!
- Rule 12A-1.045, F.A.C.

SALES TAX RECORD KEEPING

- RECORD KEEPING FOR SALES
 - EXEMPTION CERTIFICATES
 - SHIPPING RECORDS
 - WELL TRAINED STAFF ON WHAT IS AND IS NOT TAXABLE
 - MONITOR SALES TAX PAYABLE ACCOUNT
- RECORD KEEPING FOR PURCHASES
 - ALL PURCHASE RECORDS SHOWING SALES TAX PAID
 - TRACKING FOR USE TAX (SALES TAX NOT PAID)
 - CURRENT RESALE CERTIFICATE (BUT USE CAUTIOUSLY)
 - WELL TRAINED STAFF ON WHAT IS AND IS NOT TAXABLE
 - CORPORATE ACCOUNTS CAN HELP.... (OFFICE DEPOT, ETC)
- HOW LONG TO KEEP RECORDS?....

Exempt Records DOR Help

- Use new DOR Application for confirming exemption certificates



HOW TO HANDLE SALES TAX CONTROVERSY

FLORIDA SALES AND USE TAX AUDIT 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

DON'T PANIC!



- What Exposure Do you Have?
- Who is going to handle the audit?

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

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
 - Fax (don't email - not confidential)
- 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 (1st meeting)
 - Bank Statements (wait for request)
 - Fixed Asset Purchases (1st Meeting)
 - 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.

FLORIDA
DEPARTMENT OF REVENUE

NOTICE OF PROPOSED ASSESSMENT

08/02/2012

C/O LAW OFFICES MOFFA, GAINOR &

Audit Number :
Tax : Sales and Use Tax
ID Number :
Audit Period : 08/01/2008 - 07/31/2011

DR-831
R-3251
Page 1 of 2

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 - Fraud	\$	45.84
Penalty - Other	\$	0.00
Interest Through 08/02/2012	\$	0.00
Total Deficiency	\$	6,941.84
Less: Payment(s)	\$	47,739.75
Less: Offset(s)	\$	0.00
Balance Due	\$	47,739.75

Plus additional daily interest at 7.75% per day from 08/03/2012, 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 11/03/2012 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 32314-5139
Phone: 850-617-8565 Fax: 850-245-5581

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

- 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

CRIMINAL INVESTIGATION

- Friendly surprise visit from a DOR agent?
- LOOK at the business card - "INVESTIGATOR"
- Take this VERY seriously!
- Remember - accountant/client privilege does not apply in criminal matters.
- KOVEL LETTER - gives accountant the protections of attorney-client privilege.

CRIMINAL INVESTIGATION

- BEFORE CHARGES ARE FILED...
 - Seriously consider getting an attorney involved
 - Try to settle the matter and pay amounts due
 - Records can be subpoenaed
 - Deferment Programs offered in some counties
- AFTER CHARGES ARE FILED...
 - Arrest warrant will be issued
 - Negotiate with the Assistance State's Attorney
 - Very favorable payment plans offered
 - But - taxpayer will likely have to plead guilty
 - Going to trial is very dangerous - jail time

REVOCATION OF REGISTRATION

- FL DOR has power to revoke a business's sales and use tax registration
- Informal hearing at local level
 - Payment plan / resolve issues
- Formal hearing with attorney general
- If registration revoked, then DOR has the authority to use police force to shut down the business.
- FL DOR using these more and more lately...

DENIAL OF NEW REGISTRATION

- Owners, officers, directors of business with outstanding liabilities?
- Deny any new registrations until old liabilities are paid.
- Latest trend - Denial of new registration while old business is under audit or in protest

TRANSFeree LIABILITY

- Buying the stock or substantially all the assets of a business also buys the sales tax liabilities of the business
- If the prior business does not pay its liabilities, then the new purchaser can be in for a shock
- There are new ways to minimize this risk...

AGGRESSIVE COLLECTOR?!?

- Collectors often stretch the truth...
 - "All Your Appeal Rights Have Passed"
 - "I'll send the Sherriff out there to arrest you today"
 - "You don't want to go to jail do you?"
 - "You have to come in today to pay"
- Collectors have a tough job, but...
- Remember - head of the local office is the head of collections for that office.
- They do have the power to freeze bank accounts

FLORIDA SALES & USE TAX

Discover you (or your client) made mistakes?

VOLUNTARY DISCLOSURE THE LEAST PAINFULL SOLUTION

- Reduced or no penalties
- Only look back 3 years
- Reduced chance of audit

FLORIDA SALES AND USE TAX

QUESTIONS ?

FLORIDA SALES AND USE TAX

James H Sutton, Jr., CPA, Esq
Moffa, Sutton, & Donnini, PA
JamesSutton@FloridaSalesTax.com
813-775-2131

PLEASE DON'T HESITATE ASKING QUESTIONS
AFTER THE PRESENTATION