

FLORIDA SALES AND USE TAX

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LINKEDIN GROUP DEDICATED TO FLORIDA TAX MATTERS



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

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.

CAN A CPA/ACCOUNTANT BE HELD LIABLE?

- Grand Jury Report presented to the Florida Legislature in 2011 suggested CPA's and accountants should be prosecuted for sales tax fraud.
- The report suggests that this scenario reflects an intentional scheme to underreport and underpay sales tax and, more importantly, that the CPA is arguably in on the scheme.
- **seek prison sentences, full restitution, interest, and fines for all accountants and CPAs and tax cheats charged under deliberate schemes to defraud Florida of sales tax collected but not remitted.**

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

CRIMINAL PENALTIES IN FLORIDA SALES TAX

10/23/12 – Fort Myers used car dealer arrested for \$19,000 in unremitted sales tax

10/19/12 – Fort Myers shoe store owner arrested for \$6,000 in unremitted sales tax

10/31/12 – Cape Coral sign manufacturer arrested for \$4,000 in unremitted sales tax

10/16/12 – Cape Coral used car dealer arrested for \$8,000 of unremitted sales tax

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

CRIMINAL PENALTIES and BANKRUPTCY

- Remember: Bankruptcy will not extinguish the civil taxes, penalties, or 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.

FLORIDA SALES & USE TAX

**INTERACTIONS WITH
FLORIDA**

DEPARTMENT OF REVENUE

FLORIDA SALES & USE TAX

- 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

FLORIDA SALES AND USE TAX

**FLORIDA SALES AND
USE TAX AUDITS**

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)
- **DR-846: Self Assessment Request**
 - (aka Desk Audit) like performing surgery on yourself...
- **DR-840: Audit of Books/Records**
 - (aka Field Audit) – full audit of your company, facilities, procedures, and records. Akin to a lobotomy...
- **Criminal Investigation Audit**
 - Trying to put you in JAIL - you need a lawyer

DON'T PANIC!



FLORIDA SALES TAX AUDITS

- 4 GENERAL AREAS OF FOCUS:
 1. SALES (Gross sales, exempt sales, proper records)
 - SALES TAX RETURNS vs FEDERAL TAX RETURNS vs BOOKS
 2. RENT (Does the taxpayer own or rent the property)
 3. FIXED ASSET PURCHASES (Easy to find on Federal Depr. Sch.)
 4. GENERAL PURCHASES (Expense accounts)

FLORIDA SALES TAX AUDITS

- Who is going to handle the audit?
 - In-house accounting department?
 - Outside CPA accounting firm?
 - Legal Counsel?
- How can you bill for this work?

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

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.

FLORIDA SALES TAX AUDIT

CAN'T GET THE AUDITOR TO RESPOND?

www.MyFlorida.com

411 tab (top right)

State employee directory

With phone numbers and emails

Emails of all employees are saved and become permanent record.

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

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.

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.

SUE THE FL DEPT OF REVENUE?

- DIVISION OF ADMINISTRATIVE HEARINGS (DOAH)
 - ONLY PAY UNCONTESTED ISSUES
- CIRCUIT COURT
 - HAVE TO 'PAY TO PLAY'
- Depending on the issues – the cost can be very reasonable.

FLORIDA SALES AND USE TAX

RETAIL ALCOHOL

AND

TOBACCO INDUSTRIES

FL ALCOHOL & TOBACCO INDUSTRY

- 2011 WHOLESALEREPORTING REQUIREMENTS (§ 212.133, F.S.)
- REPORT ANNUAL SALES
- BY TYPE OF PRODUCT
- BY MONTH
- BY RETAILER

FLORIDA SALES AND USE TAX

- CONVENIENCE STORES
- LIQUOR STORES
- RESTARAUNTS
- BARS

FL ALCOHOL & TOBACCO INDUSTRY

- According to Barbara O'Donnell, revenue program administrator with the DOR:
- 946 wholesalers in Florida
- 140,000 distinct retailers
- \$10.3 billion in purchased ABT products

FL ALCOHOL & TOBACCO INDUSTRY

- RESULT: STATEWIDE TASK FORCE
- EVERY AUDITOR ASSIGNED AT LEAST ONE
- 300 AUDITS IN PROCESS
- 200 AUDITS INITIATED EACH QUARTER
- 41 IN NOPA PHASE - \$13 MILLION
- ONLY 3 PROSECUTION REFERRALS THUS FAR...
- AFTER AUDIT NOTICE - 67% INCREASE

FL ALCOHOL & TOBACCO INDUSTRY

- So what can you do?
- 1st – Do NOT admit to criminal wrongdoing!
- 2nd – Challenge the statistical assumptions
- 3rd – Provide real facts to contradict
 - Have No Records? (Use a Month AFTER Audit)
- 4th – Help with a payment plan

FL ALCOHOL & TOBACCO INDUSTRY

- Client's in this industry should be planning ahead.... Potential Voluntary Disclosure?
 - Statutory Reduction of Penalties to 5%
 - MUCH more relaxed administrative review
 - No chance of triggering an audit (Fire Walled)
 - Good chance of stopping an audit
 - Almost guarantee of no criminal charges

FL USED CAR DEALER INDUSTRY

- We have started hearing rumors that the next industry to be targeted will be....

USED CAR DEALERS

FLORIDA SALES & USE TAX

INTERCOMPANY RENT

INTERCOMPANY RENT

- Sales Tax Law vs Federal Income Tax Law
 - IRC: Substance Over Form (Sec. 381 powers)
 - SUT: Form Over Substance (No Sec. 381 powers)
- The area that catches most people off guard
 - ALL entities are treated as separate taxpayers for SUT purposes, even commonly owned & disregarded.

INTERCOMPANY RENT

- Payments made to the landlord or on behalf of the landlord for the right to occupy the premises = RENT
 - Sec. 212.02(12), F.S.; Rule 12A-1.070 FAC
- If operating entity does not own building...
 - Federal Tax Return show Rent?
 - Tenant pays mortgage? Property taxes?
 - Lease agreement?

INTERCOMPANY RENT

- Dept of State – Companies with Same Address
- County Property Tax Records – Who Owns?
- Letter Audit to Owner

- It is that easy...

- Generating HIGH REVENUE for little effort

INTERCOMPANY RENT

- If you have an odd set of facts, case law is in your favor... “did the parties intend rent?”
- FL DOR v Ruehl (12-30-12)
 - Tenant Improvements
- US Cardio Vascular v FL DOR (9-23-2008)
 - Salaries for leased employees called “Rent”

INTERCOMPANY RENT

MINIMIZE TAX IMPACT GOING FORWARD

- No FMV Requirement
 - Reduce rent in new lease
- Distribute funds to common owner then contribute to land entity
- Passive Activity Loss concerns?
 - Look into Grouping Rules (IRS Pub. 925)

FLORIDA SALES & USE TAX

**MANUFACTURING
INDUSTRY**

MANUFACTURING EXEMPTIONS

- 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 (Sec. 212.08(5)(b), F.S.)
 - Pollution Control Equipment (Sec. 212.051, F.S.)
 - Research & Development Equipment (Sec. 212.08(18), F.S.)
 - Repairs to Equipment in most industries (Sec. 212.08(7), F.S.)

FLORIDA SALES & USE TAX

WHERE TO FIND
THE LAW?

FLORIDA SALES AND USE TAX

Where to find the law?

Last thing you want:



Client calls the FL DOR Tax Hotline!

FLORIDA SALES AND USE TAX

Where to find the law?

- Chapter 212, Florida Statutes
 - www.leg.state.fl.us/statutes
- Chapter 12A-1, Florida Administrative Code
 - www.FLRules.org
- Technical Assistance Advisements (TAA)
 - www.myflorida.com/dor/
- Division of Administrative Hearings (DOAH)
- Circuit Court Cases
- District Court of Appeals Cases
- www.FloridaSalesTax.com

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QUESTIONS ?

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