IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

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

Appellant,

v.

Case No. 1D14-3213
L.T. Case No.: 2011-CA-1498

STATE OF FLORIDA, DEPARTMENT OF REVENUE, a state agency,

Appellee.
_____/

INITIAL BRIEF OF APPELLANT, VERIZON BUSINESS PURCHASING, LLC

Appeal of a Final Order from the Second Judicial Circuit

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STATEMENT OF THE CASE AND OF THE FACTS[1]

This is an appeal of a final judgment entered after the circuit court granted the Department's motion for summary judgment and denied Verizon's. [V5 781-83.][2] Verizon argued that the Department's assessment against Verizon for sales and use taxes was barred by the applicable statute of limitations. [V2 87-111.] The circuit court disagreed, holding that the Department's Notice of Proposed Assessment—which was issued before the statute of limitations deadline—constituted an "assessment" for purposes of determining whether an actual assessment was issued before the statute of limitations deadline. [V5 730-36.] As explained in this brief, the circuit court's holding is directly contrary to statutory interpretation and guidance, ignores the rules of statutory construction and unlawfully extends the statute of limitations for the assessment of sales and use tax. The underlying facts are as follows:

The Department audited Verizon for sales and use taxes under chapter 212, Florida Statutes, for the period January 1, 2004 through December 31, 2006 (the "Audit Period"). [V5 730.] On October 27, 2008, the Department issued Form DR-1215–Notice of Intent to Make Audit Changes (the "Notice of Intent")–to

[1] Plaintiff/Appellant, Verizon Business Purchasing, LLC, is referenced as "Verizon." Defendant/Appellee, State of Florida, Department of Revenue is referenced as "the Department."

[2] Record references are as follows: [V1 1] references Record volume 1, page 1.

Verizon relating to the Department's audit. [V2 90.] On or about August 6, 2010, the Department and Verizon executed Form DR-872–Consent to Extend the Time to Issue an Assessment or to File a Claim for Refund (the "Extension Request"). [*Id.*] The express purpose of the Extension Request was to clarify the parties' agreement that under section 95.091(3)(a), Florida Statutes, the Department had until March 31, 2011 to assess Verizon for additional taxes owed for the Audit Period. [*Id.*] This acted to extend the applicable statute of limitations to that date.

On February 8, 2011, the Department issued a Notice of Proposed Assessment under chapter 212 to Verizon for sales and use taxes and interest totaling $3,169,168.74. [V2 91.] The Notice states that, provided no informal protest is filed, the proposed tax liability described therein would become a final assessment sixty days from its issue date, or April 11, 2011**,** eleven days after the agreed Extension Request expired. [*Id.*]

Verizon filed a complaint against the Department in circuit court challenging the tax liability contained in the Notice of Proposed Assessment. [V1 5-36.] Verizon subsequently filed a three-count amended complaint. [V1 42-72.] Count I asserted that, because the proposed assessment did not become an actual, final assessment until after the applicable deadline in section 95.091(3), Florida Statutes, the tax assessment was barred. [V1 50-51.] Counts II and III challenged the assessment on the merits. [V1 51-54.]

Verizon and the Department filed cross-motions for summary judgment as to Count I of the Complaint. [V2 87-246; V5 655-83.] Verizon argued that the Notice of Proposed Assessment is not an assessment until that proposed assessment is no longer just proposed and it becomes an actual assessment, therefore, the Department was barred by the statute of limitations from assessing additional sales and use tax liability. [V2 87-111.] The Department argued that the Notice of Proposed Assessment was a sufficient "assessment" for purposes of defeating Verizon's statute of limitations argument. [V5 663-80.]

The circuit court entered a partial final judgment on Count I.[3] [V5 755-56.] The court held that the Department's Notice of Proposed Assessment, which did not become final until eleven days after the limitations period expired, constituted a sufficient assessment for purposes of the statute of limitations. [V5 730-36.] Verizon later voluntarily dismissed Counts II and III with prejudice. [V5 766-68.] The circuit court then entered a final judgment on Count I, reaffirming its earlier partial final judgment finding the assessment was timely (the "Order"). [V5 781-83.] This appeal followed. [V5 786-92.]

[3] Verizon appealed the partial final judgment, which this Court dismissed as premature. *Verizon Bus. Purchasing, LLC v. Dep't of Revenue*, 111 So. 3d 191, 192 (Fla. 1st DCA 2013).

SUMMARY OF THE ARGUMENT

Under section 95.091(3)(a), 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." An assessment issued after the statutory deadline has expired is invalid as a matter of law. The sole issue in this appeal is whether the circuit court properly computed the three-year statute of limitations for tax assessments under Florida law. In deciding this question, this Court must strictly construe the applicable taxing statutes in Verizon's favor and against the Department. Under any construction, the applicable statutes firmly establish that a Notice of Proposed Assessment is not, and cannot be, an "assessment" sufficient to allow the Department to escape its failure to timely assess the purported tax liability at issue.

The Department's tax procedure is straightforward. A Notice of Proposed Assessment is issued following an audit. That Notice does not become a final, legal assessment until sixty days after its issuance. In this case, the parties agreed that the Department could have extra time to issue a final assessment – giving the Department until March 31, 2011 to do so (and extending the applicable statute of limitations deadline to that date). However, the Department did not issue a final assessment by that deadline. Instead, the Department mailed a Notice of Proposed Assessment to Verizon on February 8, 2011, with less than sixty days left in that

statute of limitations window. That Notice, on its face, reflects that it did not become a final and thus legal assessment until April 10, 2011—sixty days following the issuance of the Notice on February 8, 2011. Because the Notice issued to Verizon did not become a final, legal assessment until after the expiration of the extended statute of limitations period, the Department failed to timely assess Verizon.

A Notice of Proposed Assessment is not an assessment under section 95.091(3)(a) for three reasons. **First**, when read together, sections 213.21(1)(b) and 95.091(3)(a) leave no doubt that the Notice is not an assessment; it is merely a notice of a proposed assessment. **Second**, employing longstanding rules of statutory construction, the "common, ordinary meaning" of the term "assess" and "assessment" make clear that the issuance of a notice of a proposed assessment by the Department fails to satisfy the limitations requirements of section 95.091(3)(a) in that it lacks finality, and any ambiguity must be construed in favor of the taxpayer under well-established case law. **Third**, statutory guidance under chapter 220 applies in this case making clear that a proposed assessment is not an assessment under section 95.091(3)(a).

Importantly, numerous protections exist to ensure the Department does not miss statute of limitations deadlines. The parties can agree to tolling during the process—as they did here. Additionally, the statutes explicitly direct that the

statute of limitations for final assessments shall be tolled during the period in which a taxpayer is challenging a proposed assessment.

Accordingly, this Court should reverse the circuit court's final judgment and remand with directions that final judgment be entered in Verizon's favor.

ARGUMENT

Standard of Review

Whether the Notice of Proposed Assessment is a legal assessment sufficient for purposes of the statute of limitations in section 95.091 is a matter of statutory interpretation reviewed *de novo*. *Hampton v. State*, 103 So. 3d 98, 110 (Fla. 2012); *see also Sullivan v. Fla. Dep't of Envt'l Prot.*, 890 So. 2d 417, 420 (Fla. 1st DCA 2004). "Tax laws are to be construed strongly in favor of the taxpayers and against the government, and all ambiguities or doubts are to be resolved in favor of the taxpayers." *State Dep't of Revenue v. Ray Constr. of Okaloosa Cnty.*, 667 So. 2d 859, 865 (Fla. 1st DCA 1996).

Argument

I. THE LEGISLATURE HAS MADE CLEAR THAT ISSUANCE OF A NOTICE OF PROPOSED ASSESSMENT IS NOT AN ASSESSMENT FOR PURPOSES OF SECTION 95.091(3)(A).

The Legislature has carefully crafted the tax laws, leaving no doubt that a Notice of Proposed Assessment is not an assessment and cannot be used to defeat the applicable statute of limitations deadline. Section 95.091(3)(a) 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) does not expressly define the term "assess," section 213.21 explains that the assessment must be a "final" assessment, and not just a "notice" of "proposed" assessment. Section 213.21 sets forth the procedure for initiating informal conferences with the Department and the handling of compromises of tax disputes. Section 213.21(1)(b) 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). Only one statute[4] defines the statute of limitations applicable to assessments of taxes: § 95.091(3)(a). Accordingly, the two statutes must be read together. When read in conjunction with section 95.091(3)(a), section 213.21(1)(b) firmly establishes that the assessment must be a "final assessment." To read these two statutes otherwise would create a conflict and thus violate the fundamentals of statutory construction. *See Woodgate Dev. Corp. v. Hamilton Inv. Trust*, 351 So. 2d 14, 16 (Fla. 1977).

[4] As noted, § 95.091(3)(a) provides for limited exceptions to this three-year limitations window, none of which apply here.

The Notice of Proposed Assessment itself confirms this analysis. A Notice of Proposed Assessment is issued on Department of Revenue Form DR-831. [*See* V1 69.] That Form 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].

[*Id.* (emphasis added).] This language clearly informs the taxpayer of the sixty-day window to file the informal written protest contained in section 213.21(1)(b). If the Notice of Proposed Assessment were itself a final assessment, no reason would exist for it to contain the statement: "if you fail to file an informal protest" within sixty days, the proposed assessment will become final. Additionally, if Form DR-831 were itself an actual legal "assessment" for purposes of section 95.091(3)(a), the tolling language contained in section 213.21(1)(b) would be unnecessary and superfluous. *See State v. Webb*, 398 So. 2d 820, 824 (Fla. 1981) (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).

In this case, the Department issued a Notice of Proposed Assessment to Verizon with less than sixty days left in the limitations period contained in section 95.091(3)(a). The Notice expressly states that the proposed tax liability does not

become a final assessment for sixty days. Section 213.21(1)(b) makes clear that the statute of limitations period referenced in section 95.091(3)(a) relates to the issuance of a final assessment. By its terms, the Notice issued to Verizon did not become a final assessment in satisfaction of section 95.091(3)(a) until after the limitations period agreed to by the parties had expired. Because there is no dispute concerning the date the Department issued the Notice of Proposed Assessment to Verizon, and the date the limitations period expired under the Extension Request, the circuit court erred in granting summary judgment to the Department in that a final assessment must be issued prior to the expiration of the limitations period and the Notice does not constitute a final assessment.

Importantly, as noted, the statute of limitations deadline is tolled during certain parts of the process and the parties themselves can agree to toll the statute of limitations deadline. Indeed the parties here agreed to such an extension. This provides protection for the Department for purposes of a proposed assessment becoming an actual and legal final assessment and complying with the statute of limitations deadline. It also gives the Department clear guidance on its deadline for issuing a proposed assessment, knowing that the proposed assessment will become a legal, final assessment in 60 days—as stated on the face of the proposed assessment. Despite an agreed extension, the Department still failed to timely meet the statute of limitations deadline.

II. THE RULES OF STATUTORY CONSTRUCTION MAKE CLEAR THAT A NOTICE OF PROPOSED ASSESSMENT IS NOT AN "ASSESSMENT" FOR PURPOSES OF SECTION 95.091(3)(A).

The applicable rules of statutory construction are well-settled. Tax statutes are construed strongly in favor of the taxpayers and against the government. *Ray Constr.*, 667 So. 2d at 865. The "polestar" of statutory interpretation is legislative intent; however, such intent is derived primarily from the language of the statute. *See State of Fla. v. J.M.*, 824 So. 2d 105, 109 (Fla. 2002). When a term is not defined by statute, one of the most fundamental tenets of statutory construction requires that a court give a statutory term its "common, ordinary meaning." *Cason v. Fla. Dep't of Mgt. Servs.*, 944 So. 2d 306, 313 (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), which states in pertinent part:

> 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). As noted, the term "assess" is not defined in section 95.091(3)(a).[5] However, the Legislature uses the terms "assessment" and "final assessment" interchangeably in the relevant statutes. *See, e.g.*, § 213.23, Fla. Stat.; § 95.091(3)(a), Fla Stat. In addition, fundamental principles of statutory construction dictate that the term "assess" as used in section 95.091(3)(a) means something other than a "proposed assessment" contained in the Notice at issue which is still subject to revision by the Department following an informal protest.

First, the common meaning of the term "assess" as used in section 95.091(3)(a) establishes that the Notice of Proposed Assessment is not itself an assessment for sixty days. Section 95.091(3)(a) requires that the Department assess the taxpayer within the three-year limitations window. To satisfy section 95.091(3)(a), the Department must complete the requisite act— it must "assess" the taxpayer. Contained within the concept of completion of the assessment is the fundamental notice requirement to the taxpayer of the final amount due for which payment is being sought. Within the meaning of section 213.23, this completed act is formalized by the issuance of an "assessment." On its face, a notice of proposed assessment cannot constitute an assessment because it is merely a proposed assessment.

[5] Verizon maintains that the term "final assessment" contained in section 213.21 is interchangeable with the use of the term "assess" in section 95.091(3)(a).

Second, as a matter of common sense—to propose an act is antithetical to actually completing or accomplishing the act. Section 95.091(3)(a) 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. [V1 69.] The language contained in the body of the Notice is no less unambiguous and makes clear that the calculations on the form reflect a "proposed assessment." [*Id.*] Specifically, the Notice 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.

[*Id.* (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].

[*Id.* (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." [*Id.* (emphasis added).] The trial court erroneously afforded weight to the point that taxpayers are notified they can make payment

during the proposed assessment period. A taxpayer may choose to make payment prior to the final assessment for a variety of reasons including the adjustments are uncontested or a desire to stop the running of interest, none of which change the characterization of a proposed assessment.

Florida courts place great weight on the value of "common sense" in determining statutory construction cases. *See e.g., Campus Comm'ns, Inc. v. Dep't of Revenue*, 473 So. 2d 1290, 1295 (Fla. 1985) ("We agree with the trial and district courts that *The Alligator* is a "newspaper" within the common sense of the word"); *City of Sarasota v. Mikos*, 374 So. 2d 458 (Fla. 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 Fla.*, 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 common sense 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 Verizon's position. 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 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:

> [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).

The holding and rationale articulated by the court in *King* is persuasive given the similarities between the form used by the California Franchise Tax Board (*i.e*., the "Notice of Proposed Additional Tax") and the Notice at issue here. Courts in other jurisdictions also agree with *King*. *See, e.g*., *In re Proxim Corp.*, 369 B.R. 812 (Bankr. D. Del. 2007) (a proposed assessment notice was not an "assessment" until after a ten-day protest period); *In re Williams*, 183 B.R. 43 (Bankr. E.D.N.Y.

1995) (holding that a Notice of Determination was not an "assessment" because it provided for a ninety-day protest period).

The case of *Florida Export Tobacco v. Department of Revenue*, 510 So. 2d 936 (Fla. 1st DCA 1987), erroneously relied on by the circuit court and by the Department, is clearly distinguishable and therefore of no value to this Court. In *Florida Export*, the Department issued a letter to the taxpayer in which 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." As noted, 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. [V1 69.]

The Department should not be permitted to argue against the verbiage it chose to use in a form under its sole control—especially given that the taxing statutes must be strictly construed in Verizon's favor. 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.

Finally, *Florida Export* is not controlling because that case did not seek to interpret the term "assess" for purposes of setting the limitations period provided under section 95.091(3)(a). Moreover, one can safely infer that the disputed communication in the case was clearly not Form DR-831 issued by the Department. For these reasons, *Florida Export* is inapplicable to the case at bar.

III. STATUTORY GUIDANCE UNDER CHAPTER 220 CLARIFIES THAT THE "PROPOSED" DEFICIENCY STATED ON FORM DR-831 IS NOT AN "ASSESSMENT" FOR PURPOSES OF SECTION 95.091(3)(A).

Chapter 220 also provides significant guidance for defining the terms "assess" or "assessment" for purposes of explaining the procedural aspects of receiving or protesting a Notice of Proposed Assessment. It is appropriate to look to chapter 220 for guidance because the statute at issue, section 95.091(3)(a), applies equally to assessments of sales and use taxes under chapter 212 and assessments of corporate income taxes under chapter 220. Moreover, the disputed form in this case—Form DR-831—is used by the Department to notify taxpayers of "proposed" deficiencies relating to sales and use taxes *and* corporate income taxes.[6] Because there is no procedural difference in the treatment of taxpayers under chapter 212 and chapter 220, it is proper from a tax policy perspective to look to chapter 220 for support. *See State v. Coyle*, 718 So. 2d 218, 219 (Fla. 2d

[6] *Compare* [V2 113-16] (the Form DR-831 issued to Verizon 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 at [V2 161-63].

DCA 1998) (finding support for its ruling by looking to interpretations of "similar statutes"). Chapter 220 provides definitive guidance regarding the uniform tax procedure relating to both income taxes and sales and use taxes.

> 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). 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) unambiguously states that a "notice of deficiency" is not an "assessment." To the contrary, under section 220.709(1), a "notice of deficiency" issued by the Department merely sets forth "the amount of 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.

[V1 69 (emphasis added).] Section 220.703(2) 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) and section 220.703(2) together, it is clearly evident under Florida law that a "proposed assessment" is not an "assessment" for purposes of section 95.091(3)(a). Section 220.709(1) states that a "notice of deficiency" reflects a "proposed assessment."[7] Under section 220.703(2), 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, if the taxpayer does not file a protest or (2) the date the Department's decision ruling on the taxpayer's protest becomes final. Clearly, the characteristic that gives rise to an assessment under section 220.703(2) is one of finality, once the tax liability is established and not subject to further revision by the Department.

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

> 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

[7] 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).

> 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 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, as noted, 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].

[V1 69 (emphasis added).]

As referenced in section 220.713, section 220.717 addresses 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) is substantially identical to the explanation of a taxpayer's protest rights found in Form DR-831 and in Rule 12-6.003(1)(b), Florida Administrative Code. Section 220.717(2) unambiguously repeats the general theme in chapter 220 confirming that the "proposed assessment" contained on Form DR-831 is not an "assessment" under section 95.091(3)(a). This language contained on Form DR-831 is consistent with this overarching theme.

Verizon's interpretation of chapter 220 is also confirmed by the holding in *Florida Department of Revenue v. General Development Corp.*, 165 B.R. 691 (S.D. Fla. 1994), *rev'd in part, vacated in part*, 82 F.3d 428 (11th Cir. 1996), *cert. denied*, 519 U.S. 824 (1996). At issue in *General Development* was when a corporate income tax assessment is deemed to occur for purposes of the federal bankruptcy code.[8]

The taxpayer was issued a Notice of Proposed Assessment on February 2, 1979. *In re Gen. Dev. Corp.*, 138 B.R. at 129. On March 30, 1979, the taxpayer 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, the taxpayer again appealed the proposed liability. *Id*. After an informal conference,

[8] 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 (Bankr. S.D. Fla. 1992).

the Department issued a notice of decision dated April 18, 1981. *Id*. On June 18, 1981, the taxpayer filed an action in circuit court challenging the Department's determination that additional corporate income taxes were due. *Id*. Sometime after its filing in the circuit court, the taxpayer filed for Chapter 11 bankruptcy. *Id*. Several years later, on September 28, 1990, the state circuit court entered a consent judgment liquidating the Department's claim to additional corporate income taxes. *Id*. In *General Development*, the bankruptcy 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.

The taxpayer 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 "deficiency shall be deemed assessed … on the date when the decision of the Department with respect to the protest becomes final[.]"[9] *Id*. at 131 (citation and internal quotations

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

omitted). The bankruptcy court employed a common sense reading of section 214.03(2) and concluded that the decision of the Department became final on April 18, 1981 on issuance of the Notice of Decision.[10] *Id*. at 132. The procedural relevance of the Notice of Proposed Assessment was not discussed by the bankruptcy court since it did not reflect a final decision of the Department as required by section 214.03(2). The bankruptcy court's analysis and holding in *General Development* are entirely consistent with Verizon's interpretation of chapter 220 and, more generally, its position in this case. Moreover, in both *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.

By its express terms, the Notice of Proposed Assessment, Form DR-831, received by Verizon did not become an "assessment" under chapter 212 until April 11, 2011—eleven days after the statute of limitation deadline expired.

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[10] As noted, the decision of the district court was reversed in part and vacated in part. However, the district court dismissed the Department's reliance on the decision in *Florida Export*. *Gen. Dev. Corp.*, 165 B.R. at 697. The district court noted that in *Florida Export* a notice of tax due and demand for payment had been issued while the taxpayer had received no such notice and demand from the Department. *Id*. On this basis, the district court stated, that *Florida Export* was clearly distinguishable. *Id*.

IV. NEITHER SECTION 72.011(2)(A), FLORIDA STATUTES, RULE 12-6.003, FLORIDA ADMINISTRATIVE CODE, NOR THE LANGUAGE OF FORMS PUBLISHED BY THE DEPARTMENT SUPPORT THE DEPARTMENT'S CONTENTION THAT FORM DR-831 IS AN ASSESSMENT AS A MATTER OF LAW.

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

Section 72.011(2)(a) 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.

This provision fails to provide any insight as to whether Form DR-831 is an "assessment" for purposes of section 95.091(3), and, in fact, can be read in harmony with Verizon's position. On its face, Form DR-831 is a <u>proposed</u> assessment. In sixty days, the <u>proposed</u> assessment reflected on Form DR-831 becomes an <u>assessment</u>. Consistent with the statutory language in section 72.011(2)(a), in sixty days the <u>assessment</u> becomes a <u>final</u> assessment that must be appealed to the Division of Administrative Hearings or Circuit Court in sixty days.

The Department also relied on its own rule, Rule 12-6.003, to establish that the terms "Notice of Proposed Assessment" and "assessment" are interchangeable.

Rule 12-6.003 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." However, the fact that the Department shortened the reference to the "Notice" by characterizing it as an "Assessment" cannot be determinative of the issue. First, simply referencing the Notice as an Assessment does not make it an Assessment. Second, Florida law is clear that the Department cannot implement a rule inconsistent with statutory authority. *See* § 120.52(8), Fla. Stat.; *Golden West Fin. Corp. v. Dep't of Revenue*, 975 So. 2d 567 (Fla. 2008). In this case, applying the Department's interpretation of Rule 12-6.003 is unequivocally inconsistent with the statutory guidance provided by section 213.21 and chapter 220 and the Form's own language stating it is merely a proposed assessment.

Finally, the Department referenced the form language contained in the "Notice of Taxpayer Rights" attached to the Form DR-1215 (NOI) in defense of its position. The Department highlighted 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 language merely reaffirms Verizon'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 Verizon's position that the term "assess" used in section 95.091(3) is defined under section 213.21 to mean "final assessment."

CONCLUSION

For the foregoing reasons, this Court should vacate the trial court's entry of summary judgment in favor of the Department and direct the trial court to enter summary judgment in favor of Verizon.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically uploaded to the First District Court of Appeal's eDCA and further certify that a true and correct copy of the foregoing was furnished by E-Mail to Timothy E. Dennis (timothy.dennis@myfloridalegal.com) and J. Clifton Cox (clifton.cox@myfloridalegal.com), Office of the Attorney General, Revenue Litigation Bureau, PL-01, The Capitol, Tallahassee, Florida 32399-1050 (Counsel for Appellee) on this 24th day of October 2014.

/s/ Kristen M. Fiore
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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the font used in this brief is the Times New Roman 14-point font and that the brief complies with the font requirements of Rule 9.210(a)(2).

/s/ Kristen M. Fiore
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