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

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

Plaintiff,

v. Case No. 2011 CA 1498

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

Defendant.
_____/

DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND CROSSMOTION FOR SUMMARY JUDGMENT

Defendant State of Florida, Department of Revenue ("Department"), by and through its undersigned counsel, pursuant to Florida Rule of Civil Procedure 1.510, hereby responds in opposition to the Motion for Summary Judgment filed by Plaintiff Verizon Business Purchasing, LLC ("Verizon"), and, cross-moves for summary judgment on Count I of the First Amended Complaint ("Complaint"). As grounds in support, the Department states as follows:

I.

INTRODUCTION

Section 72.011(1)(a), Florida Statutes, states that "A taxpayer may contest the legality of *any assessment* . . .." (Emphasis supplied). Nowhere does the law limit tax disputes to questions regarding "final" assessments. Section 72.011(2)(a), Florida Statutes[1], provides in pertinent part:

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

[1] All references herein are to the 2011 Florida Statutes unless otherwise specified.

(Emphasis supplied). Thus, section 72.011, Florida Statutes, specifically recognizes that "assessments" exist that are not yet *final*.

Section 72.011(2)(b)1, Florida Statutes, provides that the date an *assessment* becomes final shall be determined "by rule adopted by the Department of Revenue." Pursuant to this statutory mandate, the Department adopted Chapter 12-6, Florida Administrative Code, in 1981, providing for protest and appeal procedures; informal disposition of tax controversies; and procedures for compromise of tax penalties.[2] Rule 12-6.003, Florida Administrative Code, and previous versions of the Rule, which have been in effect for more than 30 years, recognize that a "Notice of Proposed Assessment" (hereinafter "NOPA") is an assessment *when issued*, and that it *becomes* a "final" assessment 60 days later.

Verizon, however, argues that the Department's assessment was not really an assessment until it became a *final assessment* 60 days after it was issued, and that the Department was required to "issue" a "*final* assessment" within the time prescribed by the Consent To Extend the Time To Issue an Assessment or To File a Claim for Refund (hereinafter "Extension Agreement"). Neither the Extension Agreement, nor any statute or administrative rule require — or even mention — issuance of a "final" assessment before a deadline. As demonstrated herein, Verizon's theory misstates the law and is logically inconsistent.

[2] Among the rules that were adopted in Chapter 12-6 were Rules 12-6.03, Florida Administrative Code (now known as 12-6.003) and 12-6.04, Florida Administrative Code. When Rule 12-6.03 was enacted in 1981, it only contained the protest procedures. Rule 12-6.04, Florida Administrative Code (later known as Rule 12-6.004, Florida Administrative Code), which was adopted at the same time, contained the provisions relating to final assessments. Rule 12-6.003, Florida Administrative Code, was amended in 1988, in part, to refer to the final assessment provisions in Rule 12-6.004, Florida Administrative Code. Then, in 2003, Rule 12-6.003 was substantially reworded, in part, to include the final assessment provisions of Rule 12-6.004, which was repealed at that time. All references to Rule 12-6.003, Florida Administrative Code, herein are to the most recent version of the Rule, as amended in 2003.

Section 95.091(3), Florida Statutes, is the statute of limitations for tax assessments, but it does not define "assessment" or use the term "final assessment." Nowhere does Section 95.091(3) ever create a deadline for issuance of a "*final*" assessment. The Department issues an assessment, on the Form DR-831, "Notice of Proposed Assessment" ("NOPA") following an audit. The NOPA has all of the indicia required to be an assessment. Further, Rule 12-6.003, Florida Administrative Code, defines the NOPA as the "assessment" which may be protested by the taxpayer until it becomes final by operation of law 60 days after it is issued. Once a NOPA becomes final, however, the taxpayer may only challenge an assessment in circuit court or through an administrative hearing. *See* § 72.011, Fla. Stat.

Florida Export Tobacco, Inc. v. Department of Revenue, 510 So. 2d 936 (Fla. 1st DCA 1987), is dispositive. In that case, the First District Court of Appeal held that an "assessment" is any communication from the Department which states the amount of tax due and which demands payment of that tax. *See id.* at 942. The NOPA meets the criteria set forth in *Florida Export Tobacco* and, therefore, is an assessment as a matter of law.

Verizon's motion for summary judgment contends that the NOPA was not really an "assessment" until it became a "final assessment" 11 days after expiration of an Extension Agreement. Verizon advances two primary arguments in support of its position.

First, Verizon reads nonexistent language into Section 95.091(3), Florida Statutes. According to Verizon, the pertinent part of Section 95.091(3) should read:

> the Department of Revenue may determine and assess [and issue a final assessment for] the amount of any tax, penalty, or interest due under any tax enumerated in s. 72.011 which it has authority to administer . . . :
>
> * * * *

> 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[.]

The bracketed and underlined provision, which reflects Verizon's interpretation of the statute, has never been part of the law. Verizon borrows language from Section 213.21(1)(b), Florida Statutes, which tolls the time for issuance of a "final assessment" when the taxpayer has engaged in certain post-NOPA procedures to challenge the Department's assessment. "Final assessment" in Section 213.21(1)(b), refers to the point in time when there is a resolution of the Department's informal protest procedures. *See, e.g.*, Fla. Admin. Code R. 12-6.003(3)(b) (stating that a Notice of Decision issued after protest constitutes a "final assessment" for purposes of Ch. 72, Florida Statutes, as of the date of issuance).

Second, Verizon relies upon corporate income tax provisions in Chapter 220, Florida Statutes, which the Legislature or courts have never applied to sales and use taxes in Chapter 212, Florida Statutes. Unlike sales and use taxes, Florida's corporate income tax code is derived from and follows the federal corporate income tax laws. *See, e.g.*, § 220.02(3), Fla. Stat. Verizon completely ignores the pertinent legislative history, which clearly indicates that the provisions of Chapter 220 do not apply to Chapter 212.

Each of Verizon's arguments fails. The Department issued the NOPA before the expiration of an agreed-to extension of the statute of limitations, and the NOPA was a sufficient tax "assessment" for this purpose. Accordingly, the court should grant the Department's motion for summary judgment and deny Verizon's motion.

II.

STANDARD OF REVIEW

Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *See Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000); *see also* Fla. R. Civ. P. 1.510. Generally, the party moving for summary judgment has the burden to prove the nonexistence of any genuine issue of material fact. *See Holl v. Talcott*, 191 So. 2d 40, 43 (Fla. 1966). It is well established in Florida, however, that once the movant satisfies the initial burden by demonstrating the nonexistence of any genuine issue of material fact, the opposing party must present evidence sufficient to reveal a genuine issue. *See Landers v. Milton*, 370 So. 2d 368, 370 (Fla. 1979) ("It is not enough for the opposing party merely to assert that an issue does exist.").

III.

THERE ARE NO DISPUTED ISSUES OF MATERIAL FACT

The following facts are not in dispute and are sufficient to support this motion for summary judgment:

A. Background Facts Regarding The Department's Audit And Assessment Procedures

The Department is a duly formed state executive branch agency. *See* § 20.21, Fla. Stat. Among other duties, the Department has the responsibility of "regulating, controlling, and administering" revenue laws and duties as provided in Chapter 212, Florida Statutes. *See* § 213.05, Fla. Stat. Chapter 212, Florida Statutes, governs taxes on sales, use, and other specified transactions. All of the taxes at issue in this case fall under Chapter 212.

The Department conducts audits of taxpayers' records to determine if the appropriate sales and use taxes were reported, collected, and remitted to the Department. *See* §§ 20.21,

212.13, and 212.34, Fla. Stat. Unless the Department is conducting an emergency audit, the Department must give 60 days' notice of a sales and use tax audit to the taxpayer. *See id.* at § 212.13, Fla. Stat. (Relating to sales and use tax). An audit consists of a forensic examination of the taxpayer's books and records, which taxpayers are required by law to keep. *See* § 213.35, Fla. Stat. The Department begins an audit by notifying the taxpayer that it has been selected for an audit, the date the audit is to commence, and a reminder that all of the taxpayer's books and records, receipts, invoices, resale certificates and related documentation must be made available for review by the auditor. *See* § 212.13, Fla. Stat.

For many large corporate taxpayers like Verizon, which are part of an affiliated group of complexly related subsidiary, parent, and joint-venture relationships, such books and records are kept electronically and are highly voluminous in nature. *See* Steffens Aff. This electronic data may be held out-of-state, or even out of the country. *See id*. Moreover, such accounting and finance data may also be held by a subsidiary corporation, or a third-party, such as an accounting firm. *See id*. In many cases, such corporations are also handling numerous audits by multiple taxing jurisdictions. *See id*. Thus, the accounting data required to perform the most accurate audit and to precisely determine whether the taxpayer has additional tax liability is often not available within the timelines the Department has to complete the audit and issue an assessment to the taxpayer. *See id*.

When the Department is confronted with this situation, it has two options. First, it can simply complete the audit based upon the information provided, and issue an assessment prior to the expiration of the statute of limitations. *See id.* Many times, however, the taxpayer is willing to produce the records, but, for the reasons described above, is unable to immediately do so. *See id*. In that instance the Department may exercise a second option, which is to enter into a

consent agreement with the taxpayer to extend the statute of limitations that is available for the Department to issue an assessment or the taxpayer to request a refund. *See id*. This procedure benefits taxpayers by allowing them additional time to produce records which may reduce the amount of any assessment that is issued. *See id*.

After the Department has completed its review of a taxpayer's records, if a determination is made that additional tax is due, the Department issues to the taxpayer a Form DR-1215, "Notice of Intent to Make Audit Changes" ("NOI") and supporting documentation that demonstrates the basis for the Department's calculations. *See id*.; *see also* Zyra Aff. at Exs. 11-12. The NOI sets forth the amount of the Department's proposed assessment of additional taxes, penalties, and interest that the Department has preliminarily determined to be due. In addition, the NOI sets forth three options for taxpayers: (1) If the taxpayer *agrees* with the audit adjustments, the taxpayer is instructed to remit the tax due; (2) if the taxpayer agrees with only a portion of the audit adjustments, to pay those portions in which there is agreement, and to request an audit conference regarding the un-agreed amounts; or (3) if the taxpayer disputes all of the proposed adjustments, to request an audit conference. *See* Zyra Aff. at Ex. 11; *see also* Fla. Admin. Code R. 12-6.002.

In most instances, the taxpayer requests and the Department allows an audit conference. *See* Steffens Aff. At the conference, the auditor meets with the taxpayer or the taxpayer's representative, explains the basis for the audit adjustments, and advises the taxpayer of any protest rights. *See id*. The taxpayer may also submit additional information and documents, not previously reviewed by the Department, as part of this process. *See id*.

If resolution of the NOI is not reached at the conference, or if no conference is requested within thirty days, the NOI is then forwarded to the Department's central processing unit in

Tallahassee for issuance of a NOPA. *See* Fla. Admin. Code R. 12-6.002. The NOPA identifies the total amount of tax, penalties, and interest determined due by the audit process, including any modifications made since issuance of the NOI.[3] The NOPA specifies the amount of interest due *per diem*, and includes a "Remittance Coupon," which specifically instructs the taxpayer to submit the balance shown due, unless the taxpayer disputes the assessment. *See* Ex. "A." Because the NOPA is an assessment, the taxpayer may challenge it by filing an informal protest or by filing an action in Circuit Court or the Division of Administrative Hearings. *See* Steffens Aff.

Upon receipt of the NOPA, the taxpayer has four options. First, the taxpayer can simply pay the amount shown due. *See* Ex. "A." Second, the taxpayer can file an "informal protest" seeking an additional internal review by Department Staff located in Tallahassee. *See id.*; *see also* Fla. Admin. Code R. 12-6.003. Third, the taxpayer can challenge the NOPA within 60 days of it becoming a "final assessment" by exercising one of the options set forth in Section 72.011, Florida Statutes, *i.e.*, file a complaint in circuit court or a petition with the Department, requesting an administrative hearing pursuant to Chapter 120, Florida Statutes. *See* Ex. "A"; *see also* § 72.011(1)(a), Fla. Stat. Fourth and finally, the taxpayer can do nothing, and the Department will initiate collection procedures as prescribed by law. *See, e.g.*, § 213.69, Fla. Stat. (Authorizing the Department to issue warrants for the levy and sale of taxpayer's property).

B. Facts Regarding the Verizon Audit

The Department initiated an audit to determine Verizon's compliance with Florida's sales and use tax laws and regulations in January 2007. The Audit Period reviewed was from January 1, 2004, to December 31, 2006. *See* Zyra Aff. at Ex. 1. The Department issued a notice of intent

[3] A true and correct copy of the NOPA issued to Verizon in the instant case is attached hereto as Exhibit "A."

to conduct an audit or investigation of taxpayer's account and timely commenced to conduct the audit, therefore tolling the 3-year statute of limitations in section 95.091, Florida Statutes, for 1 year. *See* § 213.345, Fla. Stat.

Verizon did not provide the necessary documents during the course of the audit. *See* Zyra Aff. The Department and Verizon entered into a series of four Extension Agreements to extend the time for the Department to issue an assessment or for Verizon to request a refund, pursuant to Section 213.23, Florida Statutes. See Zyra Aff. at Exs. 7-10. These agreements were precipitated by Verizon's failures or inability to timely respond to requests for data and documents, including electronic files, for the Department's review. *See* Zyra Aff. The first agreement extended the statute of limitations for issuance of an assessment — not a "final assessment" — until December 31, 2008. The last agreement extended the statute of limitations for issuance of an assessment — not a "final assessment" — until March 31, 2011. *See id.*

IV.

ARGUMENT

A. Under Florida Statute And Case Law, The Notice Of Proposed Assessment (NOPA) Is A Legally Sufficient Assessment For Purposes Of The Statute Of Limitations.

The issuance of a NOPA is sufficient to satisfy the statute of limitations, and there is no need or legal requirement for the Department to issue the NOPA 60 days in advance of the expiration of the statute of limitations. Section 95.091(3), Florida Statutes, simply requires the Department to "assess" the taxes due within the statute of limitations, and nothing in that section requires such assessment to be "final." *See, e.g., Continental Heritage Ins. Co. v. State*, 981 So. 2d 583, 585 (Fla. 1st DCA 2008) ("It is not for [the Court] to read additional requirements into a statute which the legislature has not included.").

Section 95.091(3), Florida Statutes, states in pertinent part as follows:

> [T]he 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 . . . :
>
> * * * *
>
> 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 supplied). Section 95.091(3) does not explicitly require the "issuance" of an assessment, nor is the term "assess" defined. Neither does Section 95.091(3) use the term "final assessment."[4] Thus, it is appropriate to look to the Florida court's construction of such terms for guidance.

The First District Court of Appeal, in *Florida Export Tobacco, Inc. v. Department of Revenue,* 510 So. 2d 936 (Fla. 1st DCA 1987), previously considered a very similar situation, and, after reviewing several dictionaries and other sources, held that an "assessment" occurs when the Department has: (1) communicated the amount of taxes claimed to be due; and (2) made a demand for the taxpayer to make payment. *See id.* at 942-43. Under this definition, the Department's NOPA constitutes a legal assessment. *See id.*; *see also Harris Corp. v. Dep't of Revenue*, 409 So. 2d 91, 92 (Fla. 1st DCA 1982) (A "proposed assessment" issued by the Department sufficient to stop running of the statute of limitations).

In the instant case, the Department issued a NOI to Verizon in November 2010 that contained a "Notice of Taxpayer Rights." The "Notice of Taxpayer Rights" states that

> When the informal conference period expires, you will receive a *Notice of Proposed Assessment* (NOPA) which provides you with

[4] Further, Rule 12-6.003, Florida Administrative Code, only refers to "final" assessment for purposes of Chapter 72, Florida Statutes.

> *official notice of the amount due* and instructions for filing an informal or formal protest.

See Zyra Aff. at Ex. 11. (emphasis supplied). Subsequently, the Department issued the NOPA on February 8, 2011.

Verizon does not dispute that the NOPA informed it of the amount of taxes claimed due by the Department. Moreover, that a demand for payment is being made is implicit in the fact that a "NOPA Remittance Coupon" is included as part of the NOPA and the NOPA stated the interest owed per day. *See* Ex. "A." The NOPA determined that the assessed amount was due and owing, stating

> *If a balance* <u>*is due*</u> and you agree with the proposed assessment, *please pay the* <u>*balance due*</u> *within 60 days* from the Notice date.

Id. (emphasis supplied). The NOPA included an Addendum, showing the "Combined Liability," representing "the total tax, penalties and interest *assessed*." *Id.* at 2 (emphasis supplied). Accordingly, the NOPA meets the criteria set forth in *Florida Export Tobacco* and, therefore, is an assessment as a matter of law.

Verizon points out that it was not a NOPA on Form DR 831 that was submitted to the taxpayer in *Florida Export Tobacco*, and this contention is most likely true. In fact, the case refers to a "letter" sent to the taxpayer. If a letter of unidentified specificity is a sufficient assessment, however, then surely the Department's NOPA, which followed the issuance of an NOI and extensive workpapers backing the Department's claims, is an assessment for limitations purposes. Accordingly, the Department's issuance of a NOPA was sufficient to "assess" Verizon for purposes of the statute of limitations, and summary judgment should be granted in favor of the Department.

B. The Department's Position Is In Harmony With Section 213.21(1)(b), Florida Statutes.

The Department's position, contrary to Verizon's argument, does not render the tolling provision for "final assessments" in Section 213.21(1)(b), Florida Statutes, superfluous. A close reading of Section 213.21(1)(b), shows that it applies to various *post-assessment* procedures, when a NOPA has already been issued. Therefore, it is appropriate to refer to the results of those post-assessment procedures, in which determinations by the Department revise or sustain an assessment, as "final assessments" not subject to further internal review by the Department.

Section 213.21, Florida Statutes, states in pertinent part, as follows:

> (1)(a) The Department of Revenue may adopt rules for establishing informal conference procedures within the department for resolution of disputes *relating to assessment of taxes, interest, and penalties* and the denial of refunds, *and for informal hearings under ss. 120.569 and 120.57(2).*
>
> (b) The statute of limitations upon the issuance of *final assessments* shall be tolled during the period in which the taxpayer is engaged in a procedure under this section.

(Emphasis supplied). Section 213.21's reference to informal conference procedures "for resolution of disputes relating to assessment of taxes . . ." applies to informal protests, which may only occur after issuance of a NOPA and before the assessment becomes final. *See* Fla. Admin. Code R. 12-6.003. If Verizon's theory, *i.e.*, that there is no "assessment" until there is a "final assessment" were correct, neither Verizon nor any other taxpayer would have rights to an informal protest, because there would be no assessment that would trigger informal protest rights before the assessment becomes final. This interpretation would eliminate taxpayers' rights to challenge assessments informally and make the informal protest procedures of Section 213.21, Florida Statutes, meaningless. Reading the entirety of Section 213.21, it is clear why subsection 213.21(1)(b) refers only to the issuance of "final assessments."

The Legislature was referring to the post-assessment processes in which an already issued assessment, *i.e.*, a NOPA, could be sustained or revised through the Department's internal, informal protest process. The Legislature wanted to protect the review of the assessment, which could take several months or more to complete, and potentially result in a revision that increases or reduces the assessment against the taxpayer, from attack on the basis that the review and resulting revision were not timely, based upon the statute of limitations for the Department to "assess" a taxpayer.[5]

The Legislature, in adopting Section 213.21(1)(b), Florida Statutes, also wanted to ensure that, in order to maximize the opportunity for taxpayers to protest the assessment, the result of the informal protest procedure, which results in the issuance of a Notice of Decision or Notice of Reconsideration, would be considered timely and not subject to a statute of limitations challenge. As the opportunity to engage in the informal protest procedure is predicated upon receipt of an "assessment," it was entirely logical for the Legislature to distinguish the results of that process from the assessment received by the taxpayer, *i.e.*, a NOPA.

According to Verizon's reasoning, the rights under Section 213.21(1)(b), Florida Statutes, would be unnecessary, because an assessment would not yet have issued. If the Department could simply issue a "final assessment," taxpayers would lose the opportunity to participate in the informal protest process, because once an assessment is final, the only remedies are for the taxpayer to file a complaint in circuit court or file a petition with the Department for an administrative hearing. *See* § 72.011(1)(a), Fla. Stat.

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[5] This intention by the Legislature is further borne out by the legislative history of Section 213.21, which was originally enacted by the Legislature in 1981, *without a tolling provision*. *See* Ch. 81-178, § 13, at 540, Laws of Fla. Subsequently, in 1985, the tolling provision was inserted. *See* Ch. 85-342, § 47, at 2042, Laws of Fla. Thus it was reasonable to infer that the Legislature was trying to remedy some problem or shortcoming that had been identified in the administration of the original version of Section 213.21, Florida Statutes, which was enacted in 1981.

Moreover, the Legislature included the reference to "final assessment" in Section 213.21(1)(b), Florida Statutes, because it wanted to ensure the proper characterization of such further determinations that revise or sustain tax liability, reflected in a Notice of Decision or Notice of Reconsideration, as decisions not subject to further internal review and which may only be challenged within 60 days pursuant to Section 72.011, Florida Statutes. This consideration is especially important in light of the fact that these decisions could, in some instances, either increase or reduce the amount of an assessment.

Additionally, a review of the historical development of the term "final" in Section 213.21 indicates that the term was meant to be construed as a term of art to "set the clock" for the time a taxpayer has to bring a challenge pursuant to Section 72.011, Florida Statutes. The Legislature enacted Section 213.21 in 1981, as part of a process to grant the Department broader authority to settle tax and interest claims against assessments through informal protest procedures, and to clarify the taxpayer's election of remedies to contest an assessment when it becomes final in either circuit court or pursuant to an administrative hearing under Chapter 120, Florida Statutes, the Administrative Procedures Act. The Legislature intended for the Department to define, by rule, when an assessment would become "final." Then, as now, a taxpayer may challenge the assessment in court or in an administrative hearing within 60 days after the assessment becomes "final." *See Senate Staff Analysis and Economic Impact Statement*, HB 1171 (Ch. 81-178, Laws of Fla.).

In fulfillment of this directive, the Department adopted Chapter 12-6, Florida Administrative Code, in 1981, providing for protest and appeal procedures; informal disposition of tax controversies; and procedures for compromise of tax penalties.[6] Rule 12-6.003, Florida

[6] *See* fn. 2, *supra*.

Administrative Code, titled "Protest of Notices of Proposed Assessment Issued by the Department Which Result From an Audit" and previous versions of the Rule makes clear that the NOPA is a sufficient "assessment" and triggers the taxpayer's right to the Department's informal protest procedures. The Rule is also clear as to what is a "final assessment." Rule 12-6.003, Florida Administrative Code, states as follows:

> (1)(a) A taxpayer may secure review of a Notice of Proposed Assessment (***Assessment***) by implementing the provisions of this section.
>
> (b) To secure review of an Assessment, a taxpayer must file a written protest postmarked or faxed within 60 consecutive calendar days (150 consecutive calendar days if the Assessment is addressed to a person outside the United States) from the date of issuance on the Assessment.
>
> (c) Protests postmarked or faxed more than 60 consecutive calendar days (150 consecutive calendar days if the Assessment is addressed to a person outside the United States) after the date of issuance on the Assessment will be deemed late filed, and the *Assessment becomes final for purposes of Chapter 72, F.S.,* upon the expiration of 60 consecutive calendar days (150 consecutive calendar days if the Assessment is addressed to a person outside the United States) after the date of issuance on the Assessment, unless the taxpayer has timely secured a written extension of time within which to file a protest.

(Emphasis supplied).

As described herein, at the completion of an audit, the Department issues a NOPA to the taxpayer. The NOPA provides for a 60-day window from its issuance for the taxpayer to file an informal protest. If the taxpayer does nothing, the assessment imposed by the NOPA becomes "final" by operation of law. That event starts the running of a second 60-day window, after which the taxpayer may no longer contest the tax assessment in an administrative hearing or in circuit court.

Thus, the Department's action in issuing the NOPA, stating that an assessment becomes "final" on a date certain, serves two administrative functions: (1) to provide a cut-off date for seeking further Departmental review via the informal protest process; and (2) to inform the taxpayer of the deadline for filing a formal legal challenge, either by way of an administrative hearing or via a judicial action. *See State, Dep't of Revenue v. Ray Constr*., 667 So. 2d 859, 860-61 (Fla. 1st DCA 1996). In other words, a "final assessment" simply means *informal* review, via the Department's protest procedure, is no longer available.

In sum, Section 213.21(1)(b), Florida Statutes, should not be read to create additional requirements in the statute of limitations set forth in Section 95.091(3), Florida Statutes. Given the purpose of Section 213.21, logical reasons exist for tolling the limitations for a "final assessment" in that section. Accordingly, the Court should find for the Department.

C. In The Alternative, The Extension Agreements Tolled The Running of The Statute of Limitations.

In the alternative, even if the act of "assessment" is determined by this Court to have not occurred until April 11, 2011, this would not affect the Department's assessment of Verizon in any way. Under Florida law, the statute of limitations was tolled by the commencement of the audit, and the agreed extensions of the statute of limitations continued this tolling period until March 31, 2011. As a result of this tolling, the Department still had additional time remaining after March 31, 2011, to timely assess Verizon, and such time had not expired when the NOPA become "final" on April 11, 2011. Accordingly, the Department's assessment reflected in the NOPA is valid and should be upheld.

As stated previously, the Department must generally "determine and assess" sales and use taxes within three years after the latest of the dates that: (1) such taxes are due; (2) any return with respect to the tax is due; or (3) such return is filed. *See* § 95.091(3), Fla. Stat. Sales and use

tax returns are due from Verizon on a monthly basis. Thus, any audit period that consists of more than one month will have *multiple* statutes of limitations, *i.e.*, as each month passes the limitations period, it would no longer be subject to assessment.

Pursuant to Florida statute, however, the limitation period on assessments is *tolled* for a period of one year if the Department issues a notice of intent to conduct an audit or investigation of the taxpayer's accounts before the expiration of the statute of limitations. *See* § 213.345, Fla. Stat. Under Florida law, the tolling of a statute of limitations functions as a "time-out" which suspends the running of the limitations to bring an action, or, in the instant case, for the Department to issue an assessment. *See, e.g., Sheffield v. Davis*, 562 So. 2d 384, 386 (Fla. 2d DCA 1990).

As previously stated herein, the audit period was for the period of January 1, 2004 to December 31, 2006. The Department timely issued a notice of intent to audit on January 23, 2007, thus triggering the one year tolling period pursuant to Section 213.345, Florida Statutes.[7] At this point, 28 days were left before the expiration of the statute of limitations for the first month audited, January 2004.[8] Thus, the time for the Department to issue an assessment was tolled beginning on January 23, 2007, until January 23, 2008. At the conclusion of the tolling period, the remaining statute of limitations, 28 days, would be available for the Department to assess Verizon.

However, prior to the expiration of the tolling period, on November 15, 2007, Verizon and the Department entered into an agreement to *extend* the statute of limitations until December

[7] The Department did not begin an audit within 120 days; however, the delay was at Verizon's request, so the tolling period was not lost.

[8] This is so because the monthly sales tax return for taxes incurred in January 2004 was due no later than February 20, 2004.

31, 2008. *See* Zyra Aff. at Ex. 7. The agreement had the effect of continuing the tolling period until December 31, 2008. Verizon and the Department subsequently and timely entered into three additional agreements to extend the Statute of Limitations, which further extended the tolling period, the last of which expired on March 31, 2011. *See* Zyra Aff. at Exs. 8-10. Thus, at the expiration of the agreed to extensions of the statute of limitations on March 31, 2011, the tolling period ended, leaving the Department 28 *additional days* within which to assess Verizon for taxes that were due in February, 2004. Accordingly, the rest of the audit period was also open for audit and assessment. The NOPA became "final" on April 11, which is within 28 days of March 31, 2011, and thus, no time was lost and the assessment should be upheld.

D. Chapter 220, Florida Statutes, Governs Florida's Corporate Income Tax And Should Not Be Construed To Apply To Chapter 212, Florida Statutes, Which Applies To Sales And Use Taxes

Verizon draws heavily upon comparisons of the Department's procedures to assess sales and use tax pursuant to Chapter 212, Florida Statutes, to Chapter 220, Florida's statute governing corporate income tax. This comparison is not soundly grounded, however, because even if the procedures to administer the statutes are similar, the legal consequence of such procedures should not be read across statutes. *See, e.g., Continental Heritage Ins. Co. v. State*, 981 So. 2d 583, 585 (Fla. 1st DCA 2008) ("It is not for [the Court] to read additional requirements into a statute which the legislature has not included.").

Florida's corporate income tax act was adopted several decades subsequent to Florida's sales and use tax statute. Florida's Corporate Income Tax Act was adopted in 1971, while the sales and use tax law dates back to 1949. *See* Ch. 71-984, § 1, Laws of Fla.; *see also* Ch. 26319, Laws of Fla. (1949). The procedural model for Florida's corporate income tax code was the Internal Revenue Code ("IRC"), and Florida's corporate income tax code "piggybacks" on it.

See Dep't of Rev. v. American Tel. & Tel. Co., 431 So. 2d 1025, 1027 (Fla. 1st DCA 1983). [9] Contemporaneously with the adoption of Florida's Income Tax Code, the Legislature also enacted Chapter 214, the "Tax Administration Act of 1971" ("Tax Administration Act"). *See* Ch. 71-359, § 19, at 1837, Laws of Fla.

The Tax Administration Act was created by the Legislature for the administration of designated "nonproperty" taxes. *See id*. The *only* taxes administered pursuant to Chapter 214, however, were the corporate income tax and franchise taxes of Chapter 220, Florida Statutes, and the emergency excise tax of Chapter 221, Florida Statutes.

In 1991, the Legislature repealed the Tax Administration Act, and many of its provisions, including all of the provisions relied upon in Verizon's Motion,[10] were merged into Chapter 220. *See* Ch. 91-112, §§ 44, 47, 49, and 50, at 1153-1154, Laws of Fla. The reasoning for doing so was articulated in a legislative analysis, which states that

> Chapter 214, F.S., cited as the "Tax Administration Act of 1971," was created by the legislature for the administration of designated nonproperty [sic] taxes. The only taxes administered pursuant to these provisions are the corporate income and franchise taxes imposed by chapter 220 and the emergency excise tax imposed by chapter 221. However, taxpayers mistakenly apply the provisions of chapter 214 to other taxes, resulting in incorrect tax returns and information.

House of Representatives Committee on Finance and Taxation, Final Bill Analysis and Economic Impact Statement, CS/HB 2523, at 15. As noted, Chapter 214 did not apply to Chapter 212, which governs sales and use taxes. Tellingly, the Legislature chose *not* to insert similar provisions into Chapter 212 when it repealed Chapter 214.

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[9] Under the IRC, the term "assessment" had a discrete meaning, at which point significant lien rights attached by operation of law.

[10] Verizon relies on Sections 220.703, 220.709, 220.713, and 220.717, Florida Statutes.

Moreover, there are many other differences in Chapter 220 which make comparisons of Chapter 212 to Chapter 220 inapposite. For example, Chapter 220 permits future "truing up" of assessments when amended tax returns are filed with the Department as a result of amendments to a taxpayer's federal corporate income tax returns.

Therefore, although inviting, the Court should decline to look at a separate taxing scheme, and instead focus on the applicable statute of limitations, Section 95.091(3), Florida Statutes, and the definition of assessment as articulated in *Florida Export Tobacco*, *supra*.[11] A focus on these pertinent authorities leads to the conclusion that the NOPA was a sufficient assessment.

E. The Federal Bankruptcy Cases Relied Upon By Verizon Are Distinguishable.

Federal bankruptcy laws address the dischargeability and priority of debts (including taxes) in bankruptcy proceedings. *See, e.g.*, *In re. Britt*, 211 B.R. 74 (Bnkr. M.D. Fla. 1997) (Holding the fundamental aim of bankruptcy laws is establishment of a uniform system for ratable asset distribution among creditors). They do not address the validity of debts (including taxes) under state law. Generally, for bankruptcy purposes, tax assessments that have not become final (or which have not been adjudicated by a final judgment) have less protection than those which are final and which have been litigated to conclusion. *See generally* 11.U.S.C. §507(a)(8).

[11] However, in the event the Court agrees with Verizon's position that it is appropriate to look to Chapter 220, Florida Statutes, for guidance, it must be noted that Chapter 220.705, Florida Statutes, states that "no deficiency shall be assessed with respect to a taxable year for which a return was filed *unless a notice of deficiency* for such year *was issued not later than the date prescribed in s. 95.091(3).*" (Emphasis supplied). Thus, the Legislature has deemed the issuance of a "Notice of Deficiency" sufficient for purposes of the *exact same* statute of limitations.

Verizon cites various federal bankruptcy court cases for the proposition that an assessment arises when it becomes "final."[12] That is true for purposes of a discharge in bankruptcy. These cases are distinguishable because each addresses what constitutes an "assessment" in the entirely different context of federal Bankruptcy Code provisions that are dissimilar to Section 95.091, Florida Statutes. While Section 95.091 is a statute of "limitations," the applicable Bankruptcy Code provisions addressed in these cases, *e.g.*, 11 U.S.C. Section 507(a)(8)(A)(iii) (formerly (a)(7)), determine which tax claims are dischargeable, or what "priority" status such claims would receive in bankruptcy proceedings.

For purposes of determining whether a tax claim is dischargeable or creditor priority, courts have ruled that an assessment must become "final" before it is considered an assessment. There is *no* similar requirement in Florida's statute of limitations that a NOPA, timely issued prior to the expiration of the limitations date, must also become "final" prior to that date. *See* § 95.091(3), Fla. Stat. This is one, but not the only, reason that Verizon's cases arising under the Bankruptcy Code are immaterial.

Furthermore, the cases arising from bankruptcy proceedings are not germane because the parties lacked any incentive or rationale to argue the issue that is now presented in this case: whether a NOPA is a sufficient assessment to meet a state *statute of limitations*. For example, in the *General Development* cases cited by Verizon, the parties argued whether the "assessment" was sufficiently *late* to receive priority, not whether it was sufficiently *early* to avoid being time-barred. The issue in *General Development* involved when a Notice of Decision (which is only issued after a NOPA has been issued and a taxpayer files an informal protest) became final for

[12] Verizon cites in its Motion the bankruptcy cases of *King v. California Franchise Tax Bd*., 961 F2d. 1423 (9th Cir. 1992); *In re. Proxim Corp.*, 369 B.R. 812 (Bnkr. D. Del. 2007); *In re. Williams*, 183 B.R. 43 (Bnkr. E.D. NY 1995), and *Florida Dep't of Revenue v. General Dev. Corp.*, 165 B.R. 691 (S.D. Fla. 1994).

bankruptcy purposes. Neither party had any reason, under the facts and statutes at issue in that case, to discuss the NOPA date. All dates before the Notice of Decision, including the date the NOPA was issued, were immaterial.

The primary case upon which Verizon relies, *King v. California Franchise Tax Bd*., 961 F2d. 1423 (9th Cir. 1992), recognizes that the term "to assess" was *only* being addressed in a *bankruptcy* context and that "the determination of the precise date of assessment should be accomplished by reference to the specific tax code and practices involved." *Id.*, at 1427. In support, *King* cites *In re: Hartman*, 110 B.R. 951, 956 (D. Kan. 1990) which notes that Congress recognized that there are vast differences in various federal, state and local tax laws, and therefore, the meaning of the term "assessment" depends upon the particular tax procedures involved.

In the only dispositive case defining "assessment" under Florida law, the First District in *Florida Export Tobacco* held that an assessment is issued when a notice is sent informing the taxpayer that the Department believes that money is due. The Department's 30 year old Rule 12-6.003, Florida Administrative Code, consistent with the *Florida Export Tobacco* decision, defines a NOPA as an assessment, regardless of when it becomes "final." This long-standing interpretation is consistent with Section 95.091(3), Florida Statutes, which requires the Department to "assess" by the limitations date, but which does not require that the assessment also become "final" prior to that date. Rather than relying on distinguishable cases involving inapplicable bankruptcy provisions, this Court should instead rely on Florida statutes and case law, both of which provide for assessment without any reference to or requirement of "finality."

F. Even If Verizon Were Correct In Asserting That The Assessment Was 11 Days Late, This Would Only Bar The First Month Of The Audit Period From Being Assessed.

Verizon argues that the Department's assessment was untimely by eleven days. The Department has already explained why its assessment was timely and will not revisit that point here. However, assuming that Verizon is correct, which the Department denies, and the assessment was eleven days late in assessing tax for the first month of the audit period, it does not follow that the Department is too late to assess tax for the remaining thirty-five months.

Before the audit commenced, there were 36 separate and distinct limitations dates, one for each month during the audit period. This is because the Chapter 212 tax is payable monthly, not yearly, and certainly not based on a three year audit cycle. *See* § 212.11, Fla. Stat. For each month that tax is due, the Department starts out with three years in which to assess tax for that particular month. *See* § 95.091(3), Fla. Stat. The 36 separate three year limitations periods may then be further extended by statutory tolling and consensual agreements, which is the case here. *See* §§ 213.345 and 213.23, Fla. Stat.

Pursuant to Section 213.345, Florida Statutes, these 36 separate limitations periods were each tolled for a period of one year when the Department timely commenced an audit. Then, consensual agreements were entered which recited a current statute of limitations date, and an agreed upon new statute of limitations date. Since it would not be practical to list each of the 36 separate limitations dates, and each of the 36 new limitations dates, the Department inserts the date when the first month of the audit cycle would become time-barred, and the new date to which that first month's limitations bar date is extended. By further tolling the limitations period for the first month, each of the subsequent 35 limitations dates are similarly extended, for a like time period.

Verizon's reading of the consensual agreements is unreasonable, as it would compress 36 separate limitations dates into one single date, with the time period for assessing tax in the first month of the audit period being the same as the time period for assessing tax for the last month of a 36 month audit period. That would contradict the statute of limitations set forth in Section 95.091(3), Florida Statutes, and Section 213.23, Florida Statutes, which only authorizes the Department to enter into agreements to *extend* the statute of limitations. Moreover, such a result would be absurd, since the time for assessing month *one* would normally expire three years before the time period for assessing month *thirty-six*. *See, e.g.*, *State v. Webb*, 398 So. 2d 820, 824 (Fla. 1981) (holding courts should avoid construing statutes in a manner that avoids absurd results).

The Department's duly promulgated Extension Agreement form must be construed to extend the time for assessing tax liability in a way that does not artificially compress separate limitations dates into one new bar date. Otherwise, in some situations an extension would be a useless act that would give the Department longer to assess tax for the first month, but *less* time in which to assess tax for the last month.

Finally, since the extension of time form governs both assessments and refunds, the Court should note that Verizon's unreasonable construction would, if accepted by the Court, also serve to artificially shorten the time period in which taxpayers can seek *refunds*. For all these reasons, even if the Court were to accept Verizon's position that the Department's NOPA was issued eleven days late, it does not follow that all thirty-six months of the audit period are time barred, but, rather, that only the first month of the audit cycle would logically be time-barred. The remaining months in the audit period, would still be timely assessed.

V.

CONCLUSION

In sum, the Department's action by issuing a NOPA on February 8, 2011, was sufficient for purposes of the agreed-to Extension Agreement which extended the statute of limitations until March 31, 2011. It is undisputed that the NOPA placed Verizon on notice of the additional tax the Department believed was due. Further, the NOPA contained the criteria set forth in *Florida Export Tobacco*, *i.e.*, the amount due and a demand for payment, and therefore is sufficient as a matter of law. Verizon's arguments regarding statutes not at issue in this proceeding must not direct the Court's attention away from this fact. Moreover, even if Verizon was correct and the assessment was not sufficient until "final," the Department either had additional days available to assess Verizon, or at most, lost the ability to assess only the first month of the audit period. Count I of Verizon's Complaint fails to state a cause of action as a matter of law, and summary judgment is appropriately granted to the Department.

WHEREFORE, Defendant State of Florida, Department of Revenue requests that this Court enter judgment:

(1) finding in favor of the Department on Count I of Verizon's Complaint;

(2) determining that the Department's Notice of Proposed Assessment issued on February 8, 2011, was a sufficient assessment as a matter of law to meet the statute of limitations; and

(3) any other relief deemed appropriate.

RESPECTFULLY SUBMITTED this 4th day of APRIL 2012.

PAMELA JO BONDI
ATTORNEY GENERAL

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail and via email to Michael J. Bowen, Esquire, and Peter O. Larsen, Esquire, Akerman Senterfitt, 50 North Laura Street, Suite 3100, Jacksonville, FL 32202 this 4th day of APRIL 2012.

s/Timothy E. Dennis
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