Florida sales tax audits

When is an assessment an assessment?

By Joseph C. Moffa, Esq., CPA and Gerald J. Donnini II

"The only thing that's clear is that the meaning of 'assessment' is unclear."

A Florida sales tax audit can be seen as an intrusive process. An audit notice from the Florida Department of Revenue (DOR) can prompt feelings of stress, anxiety, fear and anger for a taxpayer. Many taxpayers feel the Florida sales-tax rules are stacked against them. Fortunately, the discrepancy over one word – "assessment" – may work to taxpayers' benefit.

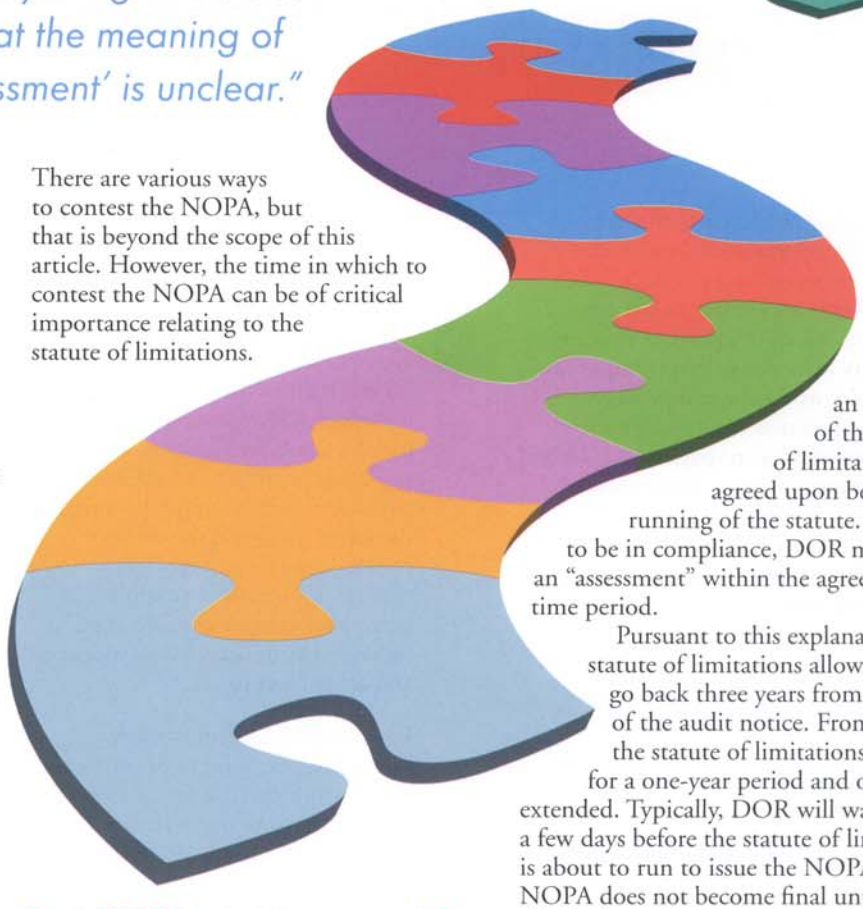
An assessment is most easily defined as imposing a tax, or a "[d]etermination of the rate or amount of something."[1] The term seems straightforward. However, similar to countless other issues in the state-tax arena, "assessment" can mean many things when it comes to its application.

The audit process begins when DOR sends the taxpayer an audit notice, formally called *Form DR-840, Notice of Intent to Audit Books and Records*. This form serves as notice that DOR will audit the taxpayer for a specified time period. Governed by the statute of limitations, DOR is allowed to go back three years from the issuance of the DR-840 and impose additional taxes.[2]

The DR-840 also tolls, or pauses, the running of the statute of limitations for one year. Depending on its complexity, the audit can last from a few days to several years. It is not unusual that the audit will not be completed within the one-year period. Therefore, DOR and taxpayers often extend the statute of limitations by agreement.

Eventually, often after several years, the audit is completed and DOR issues a *DR-1215, Notice of Intent to Make Audit Changes (NOI)*. This form indicates additional tax amounts that may be due. DOR may revise the NOI, but when finalized, it and the case file are sent to Tallahassee where the *Notice of Proposed Assessment (NOPA)* is issued.

The NOPA informs the taxpayer of the amount of tax the DOR plans to assess and becomes a final assessment in 60 days. There are various ways to contest the NOPA, but that is beyond the scope of this article. However, the time in which to contest the NOPA can be of critical importance relating to the statute of limitations.



Is a NOPA an assessment?

Section 213.23, Florida Statutes, allows for an extension of the statute of limitations date by stating:

> Notwithstanding [statutory provisions] to the contrary, if, before the expiration of time prescribed in a revenue law of this state for issuance of an *assessment* or claim of a refund, both the department and taxpayer have consented in writing to the issuance of an *assessment* or claim of refund after such time, an *assessment* may be issued or a claim for refund may be made at any time prior to the expiration agreed upon.[3]

In other words, the statute says DOR and the taxpayer can consent, in writing, to an extension of the statute of limitations, if agreed upon before the running of the statute. Further, to be in compliance, DOR must issue an "assessment" within the agreed-upon time period.

Pursuant to this explanation, the statute of limitations allows DOR to go back three years from the date of the audit notice. From there, the statute of limitations is tolled for a one-year period and often is extended. Typically, DOR will wait until a few days before the statute of limitations is about to run to issue the NOPA. The NOPA does not become final until 60 days after its issuance.

If the NOPA is an "assessment," DOR has complied with the statute and may impose a tax on the entire audit period. However, if the NOPA is what it purports to be, merely a *proposed* assessment, DOR has not timely issued an "assessment." Therefore, DOR's imposition of tax, in total or partial, is barred by the statute of limitations. Consequently, the question arises of whether the NOPA is an assessment.

Statues, DOR aren't in sync

The rules of statutory interpretation are cut and dried. If the word is defined in the statute, that meaning is used. If not, the word's plain meaning is used. Further, if a word in a tax statute is ambiguous, the meaning most favorable to the taxpayer will be used.[4] Because the Legislature >>>

chose not to define the words "assessment" or "proposed assessment" within a tax statute, the regular meaning most favorable to the taxpayer should be used.

As previously mentioned, "assessment" means imposing a tax or officially valuating something. The dictionary defines "propose" as "put[ting] forward a plan or intention."[5] Accordingly, an assessment is a determination or a final amount imposed, whereas a proposed assessment is merely an intent to assess. Since the statute speaks only to an assessment, a final imposition or official valuation of the tax, a proposed assessment is not an assessment.

DOR's position is that a proposed assessment is an assessment and unambiguous. DOR suggests that the statute requires an assessment be issued prior to the running of the statute of limitations, meaning any type of assessment, final or proposed. Relying on case law, DOR also claims that an assessment is issued when it has communicated the amount of and demanded payment of taxes due.[6] From its perspective, DOR has complied with the statute because the NOPA issued is a type of assessment and demands payment for an amount of taxes due.

However, a proposed assessment is not an assessment as required by the statute. First, the document the taxpayer receives is a *proposed* assessment. It is unlikely the document is entitled a proposed assessment for no reason. The proposal becomes final in 60 days, at which point it is becomes a final assessment, rather than at the point it is proposed.

Further, DOR's reliance on case law to support its definition of assessment actually favors the taxpayer because, as evidenced by the NOPA, payment is not demanded until the proposed assessment becomes final. And finally, the proposed assessment is not an assessment because at the very least, the definition of an assessment is unclear, and the plain meaning most favorable to the taxpayer should be used to define it.

There has never been a case litigated to resolve the definition of "assessment" within the relevant statutes. And since both sides make a compelling argument, it will be interesting to see how a court will rule.

Is a "proposed assessment" an "assessment?" Or is it merely a proposal, or a plan to assess? Based on the statutes, the only thing that's clear is that the meaning of "assessment" is unclear. One day the court will have to resolve this issue and define if a NOPA qualifies as an assessment. Until then, taxpayers should evaluate whether to sign statute extensions within the last 60 days before the statute of limitations runs.

Filing a protest or initiating litigation can toll the statute of limitations. Therefore, if the NOPA is issued less than 60 days before the statute will expire, taxpayers should wait until after the statute has expired before filing a protest or taking other action to challenge the NOPA. If the NOPA is not an assessment, waiting to challenge it until after the statute of limitations has expired may eliminate months or years and, in some cases, the entire tax liability. **FCT**

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FOOTNOTES:

1. *Blacks Law Dictionary* (8th ed. 2004)
2. Fla. Stat. § 95.091(3)(a)
3. Fla. Stat. § 213.23
4. *See* Joshua v. City of Gainesville, 768 So. 2d 432, 435 (Fla. 2000); Hous. Auth. Of Plant City v. Kirk, 231 So. 2d 522, 524 (Fla. 1970); Walgreen Drug Stores Co. v. Lee, 28 So. 2d 535, 536 (Fla. 1946).
5. *Merriam-Webster Online Dictionary*, http://www.merriam-webster.com/dictionary/assess.
6. Department of Revenue v. Ryder System, Inc., 406 So. 2d 1299 (Fla. 1st DCA 1981).