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

VERIZON BUSINESS PURCHASING, LLC,

Plaintiff,

v. CASE NO.: 2011 CA 1498

STATE OF FLORIDA,
DEPARTMENT OF REVENUE,

Defendant.
_____/

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This case is before me on the Plaintiff, Verizon Business Purchasing's (hereinafter "Verizon") motion for summary judgment and Defendant, State of Florida, Department of Revenue's (hereinafter "Department") response and cross-motion for summary judgment, on Count I of the First Amended Complaint. I have considered the pleadings, applicable law, and arguments of counsel. For the reasons set forth herein, I deny Verizon's motion for summary judgment and grant the Department's motion.

The issue in Count I is whether the Department timely assessed Verizon for sales and use taxes prior to the expiration of the statute of limitations. Specifically, was the issuance of the Notice of Proposed Assessment (hereinafter "NOPA") by the Department, an "assessment" for purposes of the applicable statute of limitations.

The following facts are undisputed by the parties. In January 2007, the Department notified Verizon that it was going to audit the monthly sales tax returns that Verizon had filed for the preceding three-year period, January 2004 through December 2006. The audit was commenced and due to various reasons, Verizon and the Department entered into a series of four agreements

extending the statute of limitations time period during which the Department could issue an assessment or Verizon could seek a refund (Extension Agreement(s)). Florida Statute, section 213.23 (1), permits the Department to "enter into agreements with taxpayers to extend the period during which an assessment may be issued." Said statute also permits the Department to extend the period by subsequent agreements. *Id.* The fourth and final Extension Agreement was entered into in August 2010, and provided that the new statute of limitations date for issuance of an assessment would be March 31, 2011. In November 2010, the Department issued a "Notice of Intent to Make Audit Changes" to Verizon, which included extensive documentation showing the Department's calculations of additional taxes it claimed due. On February 8, 2011, the Department issued the NOPA to Verizon, informing it of the Department's final calculation of additional tax due, and it included a remittance coupon. By its terms, the NOPA became a "final assessment" on April 11, 2011.

The applicable statute of limitations for sales and use taxes, section 95.091(3), Florida Statutes, states in pertinent part as follows:

> (a) With the exception . . . 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 . . . :
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> * * * *
>
> 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[.]
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> * * * *

The Department's NOPA in the instant case constitutes an assessment. The First District Court of Appeal, in *Florida Export Tobacco, Inc. v. Department of Revenue*, 510 So. 2d 936 (Fla. 1st DCA 1987), held that for purposes of chapter 212, Florida Statutes, an "assessment" occurs whenever 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. Additionally, the term "assessment" is of particular importance to the authority of the Department, as it confers the authority to demand interest and/or penalties when taxes are not timely paid. *Id.* Moreover, Rule 12-6.003 of the *Florida Administrative Code*, refers to the NOPA as an assessment. In November 2010, the Department directly communicated to Verizon, by issuance of the Notice of Intent to Make Audit Changes, the basis for the additional tax it considered due. On February 8, 2011, prior to the expiration of the Extension Agreement, the Department issued it's NOPA, which indicated the final amount of additional tax due. Furthermore, because the Department had determined that the amount shown on the NOPA was owed, a demand for payment was inherent by the inclusion of a remittance coupon. Thus, I find that the Department's NOPA was a sufficient assessment for purposes of the statute of limitations.

Verizon contends that the nomenclature of the NOPA as a *proposed* assessment must mean that the amount due shown on the NOPA is not actually yet "assessed." I find this argument unpersuasive. The Department, at the time it issues a NOPA, has completed its work on the audit and fixed the amount of additional tax due. The NOPA communicates to the taxpayer the amount of taxes due and makes a demand for payment to the taxpayer. Furthermore, it has been found that "the term 'assessment' is also used in connection with taxpayers' rights to administrative and later, judicial review." *Dep't of Revenue v. Catalina Mktg. Corp.*, 20 So. 3d 1029 (Fla. 2d DCA 2009). Thus, the word "proposed" is indicative that there is a period of time in which the taxpayer may file an informal protest for an internal review of the NOPA by the Department.

The informal protest procedure, however, must be affirmatively elected by the taxpayer within sixty (60) days of receipt of the NOPA, and there is no guarantee that the outcome will result in a change in the Department's assessment. After the expiration of this first sixty (60) day period, the NOPA ripens into a "final assessment," which pursuant to Florida Statutes 72.011, starts a

second 60-day window, during which the taxpayer may only challenge the assessment in circuit court or the Division of Administrative Hearings.[1] Thus, the NOPA, in stating that it becomes "final" on a date certain, serves two important 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 under section 72.011.

As an additional ground, Verizon argues that Florida Statutes 213.21(1) (b) must indicate that only a "final assessment" adequately satisfies the statute of limitations. This section provides for a tolling of the limitations period for the issuance of "final assessments" when certain informal procedures are sought. Section 213.21 is not at issue in this case, because it is undisputed that Verizon has not sought any of the informal procedures mentioned in the statute. However, even if section 213.21 were at issue, it states that such procedures are for the "resolution of disputes relating to assessment of taxes...," indicating that an assessment of taxes exists prior to the informal procedures and a "final assessment."

Florida Statutes 95.091(3) states the Department must "assess" a taxpayer within three years. Section 213.21(1) (b) demonstrates that, if it had desired, the Legislature could have inserted a requirement for a "final assessment" into section 95.091(3). As it has not done so, however, the Court may not read such a requirement into the statute. *See, e.g., Continental Heritage Ins. Co. v. State*, 981 So. 2d 583, 585 (Fla. 1st DCA 2008). Thus, this basis for invalidation of the Department's NOPA also fails.

Verizon also relies on various procedural provisions in chapter 220, Florida's corporate income tax statute, to support its argument that an "assessment" has not occurred until a NOPA has ripened into a "final assessment." The various provisions in chapter 220 cited by Verizon all relate

[1] If the taxpayer does nothing during these two 60-day periods, however, the Department will take action to collect the amount indicated in the NOPA.

to the procedure for issuance of a "notice of deficiency" to corporate taxpayers for purposes of assessing additional corporate income taxes, and that the "notice of deficiency" for corporate income purposes is the equivalent of a NOPA for sales tax purposes. First, this is a sales tax case under chapter 212, Florida Statutes, and I am not persuaded that I should rely on chapter 220, which is not at issue. Moreover, chapter 220 states that an assessment may not be made for a tax year unless a "notice of deficiency of such year was issued not later than the date prescribed in s. 95.091(3)." Thus, the Legislature has stated that a notice of deficiency, the procedural equivalent of a NOPA, is a sufficient assessment for purposes of the same statute of limitations.

Finally, even if the NOPA was not an assessment, I find persuasive the Department's argument that only the first month of the audit period would be untimely. The dates stated on the Extension Agreement only relate to the first month of the audit period. There are 36 separate and distinct tax periods at issue in this case, one for each month reviewed during the audit. *See* Florida Statutes 212.11. For each month that the tax is due, the Department has three years in which to assess tax for that particular month. *See* Florida Statutes 95.091(3). The 36 separate three-year limitations period may then be further extended by statutory tolling and consensual agreements. *See* Florida Statutes 213.23 and 213.345. In the instant case, the Department notified Verizon of its intent to audit in January 2007. The first month of the audit period was January 2004, for which the return was filed with the Department in February 2004. The last month of the audit period was December 2006, and the return for that month was filed in January 2007. If no other action had occurred, the three-year limitation period would have expired for the first month of the audit period in February 2007, and the last month in January of 2010. The Department's timely notice of an audit in January 2007, however, tolled the statute of limitations for each of the individual tax periods for an additional year. *See* section 213.345, Florida Statutes.

Prior to the expiration of the first month of the tolled limitations period, however, the Department and Verizon entered into the first of four Extension Agreements. This Extension Agreement, entered into in November 2007, provided that the new statute of limitations date to issue an assessment would be December 31, 2008. This date, however, is before the applicable tolled statute of limitations dates for the majority of the audit period. It would not make sense for the Department to agree to extend the period for assessing some of the early months of the audit period, but shorten the statute of limitations for the majority of the audit period.[2] Moreover, section 213.23(2), Florida Statutes, only permits the Department to enter into consent agreements to extend the time for issuing assessments; not to shorten the time period.

In the case of multiple taxing periods, the best approach is to consistently construe Extension Agreements, which include a new statute of limitations date, to refer to the first month of the taxing periods at issue only. All other subsequent taxing periods in the audit period are likewise extended by an equal amount of time. Thus, in the instant case, the new statute of limitations date for issuance of an assessment for the first month of the audit period, January 2004, was extended by the final Extension Agreement to March 31, 2011. The second month of the audit period, February 2004, was extended to April 30, 2011, and through all 36 months of the audit period.

It is therefore,

ORDERED and ADJUDGED that Defendant, Department of Revenue's Motion for Summary Judgment as to Count I of the Plaintiff's First Amended Complaint is granted, and that Plaintiff's Motion for Summary Judgment is denied.

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[2] Likewise, this construction would also artificially shorten the taxpayer's time within which it could seek a refund.

DONE and ORDERED in Chambers at Tallahassee, Leon County, Florida this 1st day of June, 2012.

TERRY P. LEWIS
Circuit Court Judge

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