

## Florida court holds NOPA is not an assessment until protest period expires

July 31, 2015

### Overview

In *Verizon Business Purchasing LLC v. Fla. Dep't of Revenue*,<sup>1</sup> the Florida First District Court of Appeal recently held in favor of the taxpayer in a case involving the issue of whether the Florida Department of Revenue's (Department) issuance of a Notice of Proposed Assessment (NOPA) within the agreed-upon extended statute of limitations period constituted a timely assessment of tax. In concluding that the Department had not assessed tax in a timely manner, the appellate court determined that a NOPA does not constitute an "assessment" of tax for purposes of the statute of limitations<sup>2</sup> until the NOPA becomes a "final assessment" upon expiration of the 60-day period for the taxpayer to file a protest. The court found that the NOPA at issue, by its terms, did not constitute an assessment of tax until 60 days after the date of issuance. Because the applicable statute of limitations expired before the NOPA's 60-day period had elapsed, the court held that a final assessment had not been issued within the applicable statute of limitations period, and, accordingly, the Department's assessment of tax and interest was invalid.

In this Tax Alert we summarize *Verizon Business Purchasing* and offer some taxpayer considerations.

### Background

Florida law provides a three-year statute of limitations (i.e., three years from the date the tax is due, the tax return is due, or the tax return is filed, whichever occurs latest) for the Department to timely assess additional tax, interest, or penalties.<sup>3</sup> The three-year limitations period is tolled for one additional year upon the Department's issuance of a Notice of Intent to conduct an audit.<sup>4</sup> In addition, the Department and a taxpayer may enter into an agreement that extends the statute of limitations. Upon completion of a Florida tax audit where proposed audit adjustments remain unresolved, the Department will issue a NOPA.<sup>5</sup> Within 60 days from the date of issuance of a NOPA, taxpayers may protest or request that the Department review the proposed audit adjustments.<sup>6</sup> Upon expiration of this 60-day period, if the taxpayer has not filed a protest or a request for review, the NOPA becomes a final assessment.<sup>7</sup>

### The Department's audit and the lower court's decision

The taxpayer filed monthly Florida sales tax returns with the Department for the period beginning January 2004 and ending December 2006. In January 2007, the Department issued a Notice of Intent to audit all returns for the three-year period. During the period January 2007 through August 2010, the parties entered into agreements that extended the statute of limitations for the audit period through March 31, 2011. On February 8, 2011, the Department issued a NOPA to the taxpayer indicating a proposed tax assessment of \$3,169,168.74, plus interest.

The taxpayer filed an amended complaint in the Leon County Circuit Court, challenging the Department's assessment. The complaint alleged that the Department failed to timely assess tax and interest within the applicable statute of limitations. As previously noted, the Department issued the NOPA in this case on February 8, 2011. The NOPA stated that it would not become a "final assessment" until the 60th day following its issuance. Accordingly, the NOPA became final on April 11, 2011 (i.e., the 60th day following the February 8 issuance date). The taxpayer argued that, pursuant to Fla. Stat. § 95.091(3)(a)1.b, the Department was required to issue a final assessment of any additional tax for the audit period before March 31, 2011—the extended statute of limitations deadline. Because the NOPA did not become a "final assessment" until April 11,

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<sup>1</sup> 164 So. 3d 806 (Jun. 11, 2015).

<sup>2</sup> Fla. Stat. § 95.091(3)(a)1.b.

<sup>3</sup> *Id.*

<sup>4</sup> Fla. Stat. § 213.345.

<sup>5</sup> Fla. Admin. Code r. 12-6.002(6).

<sup>6</sup> Fla. Admin. Code r. 12-6.003(1)(b).

<sup>7</sup> Fla. Admin. Code r. 12-6.003(1)(c).

2011, the taxpayer argued that the final assessment was not issued within the applicable statute of limitations, and, therefore, the assessment of tax and interest was invalid.

The parties filed cross-motions for summary judgment. The circuit court found that, within the meaning of Fla. Stat. § 95.091(3)(a)1.b, the NOPA constituted an assessment, because the Department had determined the amount due and communicated it to the taxpayer with a demand for payment. On this basis, the circuit court granted summary judgment in favor of the Department. The taxpayer appealed the matter to the First District Court of Appeal. The issue before the court was whether the NOPA constituted an “assessment,” for purposes of the Florida statute of limitations, before the NOPA became a “final assessment.”

### First District Court of Appeal’s decision

The First District Court of Appeal concluded that a NOPA does not become an “assessment” for purposes of Fla. Stat. § 95.091(3)(a)1.b until the NOPA becomes a “final assessment” upon expiration of the 60-day period for the taxpayer to protest the assessment. The appellate court’s analysis relied in part on the fact that a taxpayer is not obligated to pay a proposed assessment until the NOPA becomes a final assessment. More important to its decision, however, was language contained in Fla. Stat. § 213.21(1)(b), which provides that when a taxpayer protests or requests that the Department review a NOPA, “[t]he statute of limitations upon the issuance of final assessments shall be tolled during the period in which the taxpayer is engaged in a procedure.” The appellate court reasoned that the use of the term “final assessment” in § 213.21(1)(b), in direct reference to the limitations period established under of § 95.091(3)(a)1.b, indicated that an assessment must be a “final assessment” for purposes of the Florida statute of limitations.

The Department did not appeal the *Verizon Business Purchasing* decision; therefore, the case is final.<sup>8</sup>

### Considerations

Taxpayers should discuss *Verizon Business Purchasing* with their tax adviser, including the implications of the decision for years currently under Florida audit. In cases where a NOPA may be issued less than 60 days before expiration of the statute of limitations, taxpayers may wish to consider whether under this decision the related proposed assessment has been timely issued within the statute of limitations.

The statute of limitations at issue in *Verizon Business Purchasing* applies to all Florida taxes. Thus, even though the case involved a sales tax assessment, the court’s reasoning also would generally appear to apply to corporate income tax assessments.

### Contacts

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<sup>8</sup> The Florida First District Court of Appeal docket for this case is available [here](#).