

The ‘Oops!’ Exception: Avoiding Liability for Honest Mistakes

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Steven M. Hogan is a shareholder with the Ausley McMullen law firm in Tallahassee, Florida. His tax practice focuses on state and federal tax controversy and planning. He serves as director of the Florida Bar Tax Section's State Tax Division, and as an adjunct professor at the Florida State University College of Law.

In this edition of Florida Tax Today, Hogan explains the history of a statute that gives taxpayers a second chance when they make registration mistakes that could create sales and use tax liability, and explains the requirements of that provision.

We all know that tax law is complicated. We also know that complication causes honest mistakes. In Florida the statutes provide a way for taxpayers to avoid liability for some honest mistakes.¹ It's a chance to call "oops!" and to do it right the next time.

The Way Things Used to Be

The statutory exception to the general liability rules is a departure from the common law requirement of strict compliance with technical tax regulations. The common law rule itself was the result of conflicting Florida case law from the early 1980s. At that time, a line of case law was developing that would have let taxpayers avoid liability for unpaid sales and use tax when they failed to register for the

¹ Fla. Stat. section 212.07(9).

paperwork necessary to prove their transactions were tax exempt.

The Florida Third District Court of Appeal got things started with its decision in *Anderson v. Department of Revenue*. The Third District held that when some boat owners had purchased their boats to re-lease to others (a tax-exempt purpose under the statutes), those owners could offer proof of the tax-exempt use to avoid liability in a subsequent audit even if the owners had not properly registered for the exemption.²

The day before the Third District's decision in *Anderson*, the First District Court of Appeal took a harder line in *Pioneer Oil Co. Inc. v. Department of Revenue*.³ In that fuel tax case, the court held that the failure to register with the department for a tax-exempt use precluded the taxpayer from using after-the-fact proof that its fuel purchases were made for an exempt purpose. The court instead held that registration was a prerequisite for the exemption.⁴

When those cases came out in February 1980, it looked like the stage would be set for "express and direct" conflict between the district courts of appeal. That is always exciting in Florida, as such conflict is one of the only ways to invoke the jurisdiction of the Florida Supreme Court.⁵

² *Anderson v. Department of Revenue*, 380 So. 2d 1083, 1087 (Fla. App. 1980).

³ *Pioneer Oil Co. Inc. v. Department of Revenue*, 381 So. 2d 263, 264 (Fla. App. 1980).

⁴ *Id.*

⁵ The Florida Supreme Court is a court of limited jurisdiction. Appellants can invoke the court's discretionary jurisdiction by arguing that "express and direct" conflict exists among decisions of the district courts of appeal. See Fla. Const., Art. V, section 3(b). That does not mean that such arguments are easy to make, or that they are always successful. See Diana L. Martin and Robin I. Bresky, "Taking the Pathway of Discretionary Review Toward Florida's Highest Court," 83 *Fla. Bar J.* 10 (Nov. 2009) at 55; and Nancy Ryan, "The Misapplication Theory of Express and Direct Conflict Jurisdiction: The Florida Supreme Court Expands Its View of Its Powers," 88 *Fla. Bar J.* 10 (Dec. 2014) at 42.

However, the First District muddied the waters in June 1980 with its decision in *Fischer v. Department of Revenue*.⁶ In *Fischer*, the First District approved the Third District's holding in *Anderson*, and found that taxpayers could avoid liability by establishing the exempt nature of a transaction after the fact, even if the taxpayers were not properly registered with the department at the time of the transaction.⁷

The Florida Supreme Court ended the party in 1981 by reversing the Third District's decision in *Anderson* and approving the First District's conclusion in *Pioneer Oil*.⁸ Under the supreme court's holding, taxpayers that failed to register with the department for the relevant exemption certificates were precluded from proving the exempt nature of transactions after the fact. The court wrote, "We do not find that the later registration and tender of certificates by some of the purchasers establishes their exempt status at the time of sale."⁹

That decision ended the brief career of the common law exception for honest registration mistakes. That hard line of strict compliance would be the law for more than 20 years.

The Law Today

In 2002 the Florida Legislature changed everything with its enactment of Florida Statutes section 212.07(9). This new section provides a way out for taxpayers who make honest mistakes in failing to register with the department. Essentially, the Legislature softened the hard line taken by the Florida Supreme Court, allowing taxpayers some mercy for their honest mistakes.

Under section 212.07(9), when an entity that would qualify for a tax exemption under Florida law engages in transactions before it has registered as an exempt entity, it can be relieved

from the liability created by the failure to register if the statutory requirements are met.¹⁰ The conditions are as follows:

- At the time of the purchase, the purchaser was not registered as a dealer with the department or did not hold a consumer's certificate of exemption from the department.
- At the time of the purchase, the purchaser was qualified to register with the department as a dealer or to receive a consumer's certificate of exemption from the department.
- Before applying for treatment under this subsection, the purchaser has registered with the department as a dealer or has applied for and received a consumer's certificate of exemption from the department.
- The purchaser established justifiable cause for failing to register as a dealer or obtaining a consumer's certificate of exemption before making the purchase. Whether a purchaser has established justifiable cause for failure to register depends on the facts and circumstances of each case, including such factors as the complexity of the transaction, the purchaser's business experience and history, whether the purchaser sought advice regarding its tax obligations, whether any such advice was followed, and any remedial action taken by the purchaser.
- The transaction would otherwise qualify as exempt under this chapter except for the fact that at the time of the purchase the purchaser was not registered as a dealer with the department or did not hold a consumer's certificate of exemption from the department.

Under the provision, relief must be applied for before the department has initiated any audit or other action or inquiry regarding the purchaser or the vendor. However, if an audit or other inquiry has been initiated, the taxpayer has seven days after being informed in writing

⁶ *Fischer v. Department of Revenue*, 385 So. 2d 702, 704 (Fla. App. 1980).

⁷ *Id.* The two-judge majority in *Fischer* included Judge Larry G. Smith, who had joined the unanimous decision in *Pioneer Oil*. This made the law — and the position of the First District — especially unclear.

⁸ *Department of Revenue v. Anderson*, 403 So. 2d 397, 398 (Fla. 1981). The court did not directly address the First District's holding in *Fischer*.

⁹ *Id.* at 399.

¹⁰ Fla. Stat. section 212.07(9)(a).

by the DOR that the purchaser was required to be registered or to hold a consumer's certificate of exemption when the transaction occurred to seek relief.¹¹

Since this provision became law in 2002, the DOR has issued regulations consistent with the language of the statute.¹² Taxpayers now have this statutory provision to rely on when they have made an honest mistake in failing to register, so long as they establish justifiable cause for their mistake.

Conclusion

If your clients have mistakenly failed to register with the exemptions that they would otherwise qualify for in Florida, keep section 212.07(9) in mind. That statutory provision allows taxpayers to prove that their mistake was honest, call "oops!" on the transaction, and go forward without further penalty.¹³ ■

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¹¹ *Id.*

¹² Fla. Admin. Code r. 12-13.0064.

¹³ Or, as a wise man once put it, to "go, and sin no more." *John* 8:11 (King James).