BURSTING BUBBLES: EVIDENTIARY PRESUMPTIONS IN PERSONAL LIABILITY ASSESSMENTS

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One of the scariest things that can happen to a business owner in Florida is to receive a Notice of Assessment: Personal Liability from the Florida Department of Revenue. These notices are sent when the department believes it has enough evidence to hold an officer or director of a company personally responsible for the company's tax liability.

The personal liability assessment is authorized by F.S. §213.29. The penalty amount must be "equal to twice the total amount of the tax evaded or not accounted for or paid over." Because of this, the penalty acts as a "doubling" of the tax amount at issue. The penalty will be abated to the extent that the underlying tax is paid.[1]

Section 213.29 also grants the department a presumption that it is correct in personally assessing this double penalty. The statute states that "[a]n assessment of penalty made pursuant to this section *shall be deemed prima facie correct* in any judicial or quasi-judicial proceeding brought to collect this penalty."[2]

But what does this presumption mean? How does it affect the burden of proof when the business owner challenges the penalty assessment? Surprisingly, this issue has not been authoritatively addressed by a court of law. This article argues that the presumption under §213.29 is properly viewed as a "bursting-bubble" evidentiary presumption. The author invites counter arguments and further commentary on this important issue.

Personal Liability Assessments Under §213.29

Personal liability assessments are a way for the department to personally assess a business entity's tax liability against an officer or director of the entity. To impose this assessment, the department must establish that the officer or director of the business entity has "willfully" taken action to evade Florida's tax laws.[3]

The "willfulness" requirement means that the department must establish, as a matter of fact, that the officer or director against which the assessment is imposed has "willfully [directed] any employee of the corporation to fail to collect or pay over, evade, defeat, or truthfully account for" taxes that are due under F.S. Ch. 201 (documentary stamp tax), Ch. 206 (fuel tax), or Ch. 212 (sales and use tax).[4]

In this way, the “willfulness” requirement is akin to mens rea in the criminal context, or the “intent” prong of a fraud claim. In these types of situations, the *intent* of the accused is what matters. Without evidence of intent — the “willfulness” in evading tax — the penalty cannot be applied.

The question is how the department can prove that an officer or director of a corporate taxpayer has acted with the “willfulness” necessary to trigger a personal liability assessment under §213.29. The answer is found in the presumption created by the statute.

The Rebuttable “Prima Facie Correct” Presumption

When the department imposes a personal liability assessment under §213.29, the statute provides that the assessment “shall be deemed prima facie correct in any judicial or quasi-judicial proceeding brought to collect [the] penalty.”[5]

To examine the effects of the phrase “prima facie correct” in §213.29, we must first determine if the words create an evidentiary presumption. We must then determine whether the presumption is rebuttable.

Under the Florida Evidence Code, an evidentiary presumption is “an assumption of fact which the law makes from the existence of another fact or group of facts found or otherwise established.”[6] The “prima facie correct” language in §213.29 is being used in precisely this way: It creates an *assumption of fact* that a business entity’s officer or director has *acted willfully* in evading the tax at issue. This assumption requires one to assume that the officer or director has acted willfully, thereby making the assessment “correct.”

Because of this, we can conclude that the “prima facie correct” language in §213.29 creates an evidentiary presumption. But is this evidentiary presumption rebuttable?

The Florida Evidence Code provides the answer. According to the code, *all* evidentiary presumptions are rebuttable “[e]xcept for presumptions that are conclusive under the law from which they arise.”[7] The next question is whether the prima facie correct presumption arising from §213.29 is conclusive under the terms of the statute.

The term “prima facie correct” is not defined anywhere in Ch. 213. In the absence of a statutory definition, the term’s plain meaning will control its interpretation.[8]

The words “prima facie correct” are used together in the statute as an adverbial phrase modifying the words “assessment of penalty made pursuant to [§213.29].” *Black’s Law Dictionary* defines the adverb form of “prima facie” as “[a]t first sight; on first appearance but subject to further evidence or information.” *Black’s* goes on to provide an example of its use in this manner with the phrase, “[T]he agreement is prima facie valid.”[9]

This definition points to the use of “prima facie correct” as a rebuttable presumption of correctness. That is, the department’s assessment of a personal liability penalty under §213.29 will be presumed correct “at first sight,” but will be subject to challenge through further evidence or information. The remainder of this article examines how this rebuttable presumption operates.[10]

Bursting Bubbles and the Burden of Persuasion

Rebuttable presumptions under Florida law fall into two different categories: 1) presumptions affecting the burden of producing evidence; and 2) presumptions affecting the burden of proof.[11]

The most significant difference in how these types of presumptions work is whether they survive the introduction of evidence challenging the presumption. A presumption that affects the burden of producing evidence vanishes when contrary evidence is introduced.

Conversely, a presumption that affects the burden of proof does not vanish. Instead, it remains in the case as if the presumption itself was evidence of a fact at issue. In this way, burden of proof presumptions impact the burden of persuasion on the respective parties.

A presumption that “vanishes” when contrary evidence is produced is called a “bursting-bubble” presumption. Because this type of presumption affects the burden of producing evidence, the presumption requires the trier of fact “to assume the existence of the presumed fact, unless credible evidence sufficient to sustain a finding of nonexistence of the presumed fact is introduced, in which event, the existence or nonexistence of the presumed fact shall be determined from the evidence without regard to the presumption.”[12]

In his treatise on Florida evidence, Professor Ehrhardt gives this explanation of how bursting-bubble presumptions operate:

> *Once the evidence of the non-existence of the presumed fact is offered, the presumption disappears and the jury is not told of it. For example, in an action when an automobile driven by A collides with the rear of B's automobile, A is presumed to be negligent. However, once A introduces credible evidence to prove that A was not negligent, the presumption disappears from the case. If A does not introduce evidence to prove that A was not negligent, the jury will be instructed that if they find that a rear-end collision occurred between an automobile driven by A and one driven by B, they must find that A was negligent.*[13]

This example demonstrates that a bursting-bubble presumption disappears as soon as evidence is offered to rebut it. The parties are then left to argue their cases based on the evidence they introduce, regardless of the initial presumption.[14]

In contrast, a presumption that affects the burden of proof "imposes upon the party against whom it operates the burden of proof concerning the nonexistence of the presumed fact."[15] Stated differently, this presumption impacts the burden of persuasion.

Professor Ehrhardt gives this explanation of how burden of proof presumptions operate:

> *The term "burden of proof" [in §90.302(2)] was intended to be used in the sense of defining which party has the burden of persuasion with regard to a particular fact....When proof is introduced of the basic facts which give rise to a presumption which affects the burden of proof, the presumption shifts to the adverse party the burden of persuasion to disprove the presumed fact. If the opposing party introduces evidence to disprove the presumed fact, the presumption does not disappear. The presumption remains in the case and the jury must decide whether the evidence introduced is sufficient to meet the burden of proving that the presumed fact did not exist.*[16]

This example demonstrates that a burden of proof presumption does not "disappear" when evidence is introduced to rebut it. Instead, the presumption remains, and continues to work in favor of the party to whom the presumption was initially granted.

Bursting Bubbles Default

The next question is how to determine whether a rebuttable statutory presumption affects the burden of producing evidence under §90.302(1) or the burden of proof under §90.302(2). The Evidence Code provides a default rule to answer this question.

The "default rule" is that a statutory presumption is always a "bursting-bubble" presumption unless the presumption is one that implements "public policy."[17] Section 90.303 states that "[i]n a civil action or proceeding, *unless otherwise provided by statute*, a presumption established primarily to facilitate the determination of the particular action in which the presumption is applied, rather than to implement *public policy*, is a presumption affecting the *burden of producing evidence*."[18]

Because of this, unless a statutory presumption is expressly created as a presumption that affects the burden of proof, or the presumption is one that implements public policy, the statutory presumption is a bursting-bubble presumption.[19]

The Carve-Out for Public Policy Presumptions

The question then becomes how to determine whether a statutory rebuttable presumption that is not expressly created as one affecting the burden of proof is a presumption that implements public policy. This is the only way for such a presumption to be carved out of the bursting-bubble default rule.

The Evidence Code does not provide specific guidance on what the public policy exception in §90.303 means. Instead, §90.304 generically states that "all rebuttable presumptions which are not defined in [§]90.303 are presumptions affecting the burden of proof."[20] Professor Ehrhardt explains that:

"Although section 90.304 is not specific when it includes 'all rebuttable presumptions not defined in §90.303,' it would most often apply to presumptions that express public policy. In the early drafts of the Code, section 90.304 specifically defined presumptions that affected the burden of proof as being those presumptions which implemented public policy. However, in order to ensure that all rebuttable presumptions would be included within the definition of sections 90.303 or 90.304, the language of the latter section was changed to its present form."[21]

This comment from Professor Ehrhardt, an original drafter of the Florida Evidence Code, is instructive: The statute left out a definition of what "public policy" means in order to not exclude any existing or future presumption from being included in either §90.303 or §90.304.

Without statutory guidance, we must look to how the courts have interpreted §90.304 to determine what presumptions that implement public policy might include. The caselaw shows that public policy presumptions include those addressing protection of police and firefighters; the validity of marriage; sanity in civil cases; parentage and paternity;

exercise of undue influence; acts of public officials; correctness of judgments; intention of parties to a written agreement; against suicide; validity of a written medical consent; and competence to consent to medical treatment.[22] In this way, we can see that public policy presumptions are those that implicate human life, safety, and dignity.

Section 213.39 Creates a Bursting-Bubble Presumption

Under the law governing rebuttable statutory presumptions, the author must conclude that §213.39 creates a bursting-bubble presumption. This result is mandated by the language of §213.39 itself.

The statute creates a rebuttable presumption that is not expressly declared to be one that affects the burden of proof. Therefore, the presumption is a bursting-bubble presumption by default.

The public policy exception to the default rule does not exist here. The §213.39 presumption is, on its face, a presumption meant to "facilitate the determination of the particular action in which the presumption is applied, rather than to implement public policy."[23]

Because of this, the §213.29 presumption is a bursting-bubble presumption. The presumption will disappear when a taxpayer faced with a personal liability assessment presents evidence showing that the "willfulness" required to impose personal liability does not exist. The department will then have to present its own evidence of willfulness in order to impose the assessment.[24]

Conclusion

This article takes the position that §213.29 creates a bursting-bubble evidentiary presumption that "vanishes" as soon as the assessed person introduces evidence that he or she did not act with the "willfulness" required by the statute. This important issue will eventually be resolved by a court of competent jurisdiction. Until then, the author invites commentary and further argument on how this issue should be resolved.

[1] Fla. Stat. §213.29.

[2] *Id*. (emphasis added).

[3] Fla. Stat. §213.29 provides in full: "Any person who is required to collect, truthfully account for, and pay over any tax enumerated in chapter 201, chapter 206, or chapter 212 and who willfully fails to collect such tax or truthfully account for and pay over such tax or willfully attempts in any manner to evade or defeat such tax or the payment thereof; or any officer or director of a corporation who has administrative control over the collection and payment of such tax and who willfully directs any employee of the corporation to fail to collect or pay over, evade, defeat, or truthfully account for such tax shall, in addition to other penalties provided by law, be liable to a penalty equal to twice the total amount of the tax evaded or not accounted for or paid over. The filing of a protest based upon doubt as to liability or collection of a tax shall not be determined to be an attempt to evade tax under this section. The penalty imposed hereunder shall be in addition to any other penalty imposed or that should have been imposed under the revenue laws of this state, but shall be abated to the extent that the tax is paid. Any penalty may be compromised by the executive director of the Department of Revenue as set forth in s. 213.21. An assessment of penalty made pursuant to this section shall be deemed prima facie correct in any judicial or quasi-judicial proceeding brought to collect this penalty."

[4] *Id*.

[5] Fla. Stat. §213.29. It is beyond the scope of this article to discuss the types of proceedings in which the presumption would apply. Taxpayers can challenge an assessment in a variety of ways. *See* Mark E. Holcomb, *Department of Revenue*, Florida Administrative Practice, Ch. 9 (11th ed. 2017).

[6] Fla. Stat. §90.301(1).

[7] Fla. Stat. §90.301(2).

[8] *Knowles v. Beverly Enterprises-Florida, Inc.*, 898 So. 2d 1, 5 (Fla. 2004). The court in *Knowles* explained that legislative intent is the "polestar" for statutory construction. To determine that intent, courts must look first to the statute's "plain meaning." *Id*. Of course, statutory construction can get complicated (and contradictory) at the edges. *See* Peter D. Webster *et al*., *Statutory Construction in Florida: In Search of a Principled Approach*, 9 Fla. Coastal L. Rev. 435, 437 (2008). The "plain meaning" approach will more than suffice to interpret §213.29. Dictionary definitions can be used to discern the "plain meaning" of statutory language. *Nehme v. Smithkline Beecham Clinical Labs., Inc.*, 863

So. 2d 201, 205 (Fla. 2003) (quoting *Seagrave v. State*, 802 So. 2d 281, 286 (Fla. 2001)) ("When necessary, the plain and ordinary meaning of words can be ascertained by reference to a dictionary.").

[9] Prima facie, Black's Law Dictionary (10th ed. 2014).

[10] The author posits that the "prima facie" language in §213.29 can *only* be read to create a rebuttable presumption.

[11] Fla. Stat. §90.302(1)-(2).

[12] Fla. Stat. §90.302(1).

[13] Ehrhardt's Florida Evidence §302.1 (West 2017) (emphasis added).

[14] *See also Birge v. Charron*, 107 So. 3d 350, 359 n.16 (Fla. 2012) (quoting *Universal Ins. Co. of N. Am. v. Warfel*, 82 So. 3d 47, 54 (Fla. 2012)) (a bursting bubble presumption "is established to facilitate a particular type of legal action, and once the presumption is rebutted, it 'disappears and the jury is not told of it.'").

[15] Fla. Stat. §90.302(2).

[16] Ehrhardt's Florida Evidence §302.2 (West 2017) (emphasis added).

[17] Fla. Stat. §90.303.

[18] *Id*. (emphasis added).

[19] *See also Universal*, 82 So. 3d at 58 ("In the absence of clear statutory language to the contrary, statutory presumptions are governed by section 90.303."). The wording of §90.303 implies that, in the absence of statutory language to the contrary, a presumption can only exist for one of two reasons: 1) to facilitate determination of an action; or 2) to implement public policy. Therefore, unless a statutory presumption is one that implements public policy, the presumption will be one that facilitates the determination of an action.

[20] Fla. Stat. §90.304.

[21] Ehrhardt's Florida Evidence §304.1 (West 2017) (emphasis added).

[22] *See Universal*, 82 So. 3d at 58 (public policy presumptions are those that involve "clear expressions of social policy"; stating examples); Ehrhardt's Florida Evidence §304.1 (West 2017) (collecting cases and examples of public policy presumptions). The list included here is by no means exhaustive.

[23] Fla. Stat. §90.303. The author submits that a presumption easing the Department's ability to personally assess tax penalties against corporate officers or directors is not an expression of public policy that implicates human life, safety, or dignity. Therefore, a court of law would be unlikely to apply the public policy exception to the bursting-bubble default rule.

[24] The department has taken a litigation position in at least one case that §213.29 creates a presumption under §90.302 that impacts the burden of proof. *See Astrid Sarmentero as President for Bella Donna Couture, Inc. v. Department of Revenue*, DOAH Case No. 11-4681 2013 WL 901086, at *15 (exceptions to conclusion of law in paragraph 40 of the ALJ's recommended order). This position is stated in a conclusory manner without supporting argument. The department's final order in the case did not adopt this position. *See id*. at *3. Notwithstanding this litigation position, the issue raised in this article has not been addressed by a reported decision of a state or federal court, or by a final order from the Department of Revenue or an administrative law judge.

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