

FLORIDA'S WATER CRISES . . .*from previous page***(Endnotes)**

- 1 IRS §61(a); Rev. Rul. 60-32; Notice 99-3, 1999-1 CB 271; Notice 2006-108, 2006-2 CB 1118; All statutory references to the Internal Revenue Code of 1986 (IRC).
- 2 IRC §§ 126(a)(1) through 126(a)(8) lists eight specific federal programs, and IRC § 126(a)(9) includes "any small watershed program administered by the Secretary of Agriculture" that the IRS determines "to be substantially similar to the type of programs described in paragraphs (1) through (8).
- 3 Temp. Reg. § 16A.126-1(a).
- 4 IRC §§ 126(d), 126(e).
- 5 Defined in Temp. Reg. § 16A.126-1(b)(3).
- 6 Temp. Reg. § 16A.126-1(a).
- 7 Temp. Reg. § 16A.126-1(a).
- 8 Any amount paid as rent or compensation is ineligible for IRC § 126 exclusion. Temp. Reg. § 16A.126-1(b)(2)(iii).
- 9 Temp. Reg. § 16A.126-1(b)(5).
- 10 Temp. Reg. § 16A.126-1(b)(6).



For Whom Does the Period Toll? Statutes of Limitations in Florida Tax Audits

By: **Steven M. Hogan, Esq.**

Ausley McMullen

Tallahassee, FL

The Florida Department of Revenue is subject to a three year statute of limitations on tax assessments. This means that the Department must assess tax against a taxpayer within 36 months of the date the tax return was due.

Despite this 36 month limitation period, the Department routinely opens 36 month "audit periods" when it begins a sales and use tax audit. The Department can do this without "losing" its right to assess the early part of the audit period because of a one year statutory "tolling" of the limitations period.

While it is clear that the Department can assess a taxpayer while the tolling period is in force, what happens when the tolling period ends? Does the three year limitations period "pause" during the tolling period and "re-start" in full after it ends?

Or does the three year limitations period come back into effect after the tolling period ends, as if it was in place the whole time? Does this "cut off" the Depart-

ment's right to assess the first 12 months of the audit period?

This question is currently unsettled. This article posits that when a taxpayer is not assessed within the one-year tolling period, the Department is time-barred from assessing the first 12 months of the Audit Period. Taxpayers that are not assessed within the one-year tolling period may find these arguments relevant to their cases.

The Statute of Limitations and Tolling Period

Section 95.091, Florida Statutes, provides a three year limitations period on the Department's ability to "determine and assess the amount of any tax, penalty, or interest due" against a taxpayer. § 95.091(3)(a)1.b., Fla. Stat. The limitations period begins to run on the date a tax return is due or is filed, "whichever occurs later." Id.

When the Department initiates a sales and use tax audit against a taxpayer, the Department routinely opens a three year (36 month) audit period. For taxpayers that file monthly returns, this means that 36 separate three year limitations periods are applicable to the audit period. Each month gets its own "statute of limitations" under sections 95.091 and 212.11.

If this was the end of the analysis, it would be structurally impossible for the Department to assess a taxpayer for the full 36 month period. The Department would be in a "race against time" to complete the audit while continually losing taxable months to the statute of limitations.

The Legislature gave the Department a way around this problem. Section 213.345, Florida Statutes, provides that:

The limitations in s. 95.091(3) . . . shall be tolled for a period of 1 year if the Department of Revenue has, on or after July 1, 1999, issued a notice of intent to conduct an audit or investigation of the taxpayer's account within the applicable period of time.

§ 213.345, Fla. Stat. (emphasis added). This prevents the statute of limitations from running out for one year after a Notice of Intent to Audit is issued. The Department can use this tolling provision to audit 36 months of returns despite the statute of limitations.

The tolling provision is limited in scope, however. The Department must begin the audit within 120 days after issuing a Notice of Intent to Audit, unless the taxpayer requests a delay. § 213.345, Fla. Stat. If the Department does not start the audit within the 120 day period, the statute states that the tolling period "shall terminate" unless the taxpayer and the Department agree on an extension. Id. The Department must therefore commence the audit within four months (120 days) in order

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to benefit from the full one year tolling period.

We turn now to the unresolved meaning of this “tolling” period under Florida law.

Tolling Periods Do Not “Add” Time to Statutes of Limitation

The statute of limitations on the Department’s ability to assess taxes must be construed strictly against the taxing authority, with all ambiguities resolved in favor of the taxpayer. *Verizon Business Purchasing, LLC v. State, Dept. of Revenue*, 164 So. 3d 806, 809 (Fla. 1st DCA 2015) (citing the principle of law; applying a strict construction to statutes of limitations on tax assessments).

The question is whether the “tolling” provision in section 213.345 automatically extends the limitations periods on tax assessments by one year. The Third District Court of Appeal addressed a similar issue in *Ramirez v. McCravy*, 4 So. 3d 692 (Fla. 3d DCA 2009).

In *Ramirez*, the plaintiff in a car accident case filed suit three days after the applicable statute of limitations ended. *Id.* at 692. While the statute of limitations was running on the plaintiff’s claim, the Florida Supreme Court issued six administrative orders tolling the statute of limitations for all claims in Miami-Dade County for various periods of time. *Id.* at 693. The orders were related to five hurricanes and one tropical storm that struck the state of Florida. *Id.*

The plaintiff argued that administrative orders tolling the statute of limitations added “extra days” to the limitations period applicable to his claim. *Id.* The Third District rejected this argument, holding that: “[t]o toll means to suspend or interrupt. There is nothing intrinsic in the language that requires tacking extra days at the end of a four year period.” *Id.* at 694.

The Florida Supreme Court initially granted review of the *Ramirez* case, but would later relinquish jurisdiction. *Ramirez v. McCravy*, 37 So. 3d 240, 240 (Fla. 2010). Following the opinion relinquishing jurisdiction, Justice Pariente wrote a concurring opinion approving of the Third District’s decision. *Id.* at 241. She wrote that: “[t]he purpose of the administrative orders [tolling the statute of limitations] would not be served if a litigant could tack on days to a statute of limitations where the last weather emergency occurred six months before the expiration and the litigant does not allege that the delay in filing was based on any of the weather emergencies.” *Id.* at 242.

Under the *Ramirez* cases, when a statute of limitations is “tolled,” extra time is not added to the end of a limitations period. Instead, the tolling of a limitations period allows a litigant to file its lawsuit within the tolling period when such action would otherwise be time barred.

The same rule should follow in tax cases. Stated differently, the tolling period acts as a time when the Department can assess tax against a taxpayer when such an assessment would otherwise be time-barred.

If this was not the case, then section 213.345 would “add on” an extra year to the limitations periods applicable to each month in an audit period, so long as the Department commences the audit within 120 days.

An interpretation of section 213.345 that automatically “extends” the limitations period on assessing a taxpayer would be contrary to the holding of the First District Court of Appeal in *Harris Corp. v. Department of Revenue*, 409 So. 2d 91 (Fla. 1st DCA 1982). The issue in *Harris Corp.* was whether the Department’s assessment was time barred by the applicable statute of limitations, or whether the limitations period had been “tolled” in a way that extended the period by two years. *Harris Corp.*, 409 So. 2d at 92. The tolling provision was then contained in section 95.091(3), Florida Statutes (1979). The provision stated as follows:

Except as otherwise provided by law, the amount of any tax may be determined and assessed within 3 years after the first day of the month following the date on which the tax becomes due and payable. However, this limitation shall be tolled for a period of 2 years by a request for inspection and examination of a taxpayer’s books and records by the taxing authority within that period, in which event the period for which tax due may be determined and assessed shall be the 3 years immediately preceding the first day of the month in which a request for inspection and examination of the books and records has been made by the taxing authority.

Harris Corp., 409 So. 2d at 92 (emphasis added; quoting § 95.091(3), Fla. Stat. (1979)).

The assessment in *Harris Corp.* was issued two years and five months after the Department notified the Taxpayer of its intent to conduct an audit. *Id.* The Department’s position was that after the two year tolling period under section 95.091(3) (1979) expired, it still gained the benefit of the full three year statute of limitations as if the two intervening years had never happened. *Id.* Effectively, the Department’s position in *Harris Corp.* was that the tolling period extended the limitations period from three years to five.

The First District rejected this argument. The Court held that the tolling period was only effective if the Department completed its audit within two years. *Id.*



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The Court based its decision on the second clause in the tolling provision, which stated that: “in which event the period for which the tax may be determined and assessed shall be the 3 years immediately preceding the first day in the month in which a request for inspection and examination of the books and records has been made by the taxing authority.” *Id.* (emphasis added). The Court held that “this language requires the Department to make its assessment within 2 years of its request for inspection if it is to take advantage of the tolling provision.” *Id.*

The First District linked the tolling provision to the Department’s duty to complete the audit “within that period” that the tolling provision covered. In the event that the Department did complete the audit within the tolling period, then the limitations period would be calculated as three years from the date the Department issued its notice of intent to audit. See *id.*

Because the Department did not complete the audit within the two year tolling period, the First District held that “the Department could no longer apply the tolling provision. The statutory limitation period reverted to three years as if there had been no tolling of the time. Therefore, when the assessment was made on June 25, 1979, only those taxes due on or after June 1, 1976 were subject to the assessment.” *Id.* at 92-93.

The modern tolling provision in section 213.345 is similar to the one construed in *Harris Corp.* Section 213.345 reads as follows:

The limitations in s. 95.091(3) and the period for filing a claim for refund as required by s. 215.26(2) shall be tolled for a period of 1 year if the Department of Revenue has, on or after July 1, 1999, issued a notice of intent to conduct an audit or investigation of the taxpayer’s account within the applicable period of time. The department must commence an audit within 120 days after it issues a notice of intent to conduct an audit, unless the taxpayer requests a delay. If the taxpayer does not request a delay and the department does not begin the audit within 120 days after issuing the notice, the tolling period shall terminate unless the taxpayer and the department enter into an agreement to extend the period pursuant to s. 213.23.

§ 213.345, Fla. Stat. (emphasis added).

Like the statute in effect in *Harris Corp.*, section 213.345 references a tolling period linked to an audit of a taxpayer’s account “within the applicable period of time.” *Id.* The modern statute also provides that the tolling provision would automatically “terminate” if the audit is not begun within the initial 120 day period. *Id.*

This language is similar to the admonition in section 95.091(3) (1979) that the tolling period only applies if the Department completed its inspection “within [the tolling] period.” *Harris Corp.*, 409 So. 2d at 92.

A harmonious construction of the statute of limitation and the tolling statute leads to the conclusion that when the tolling period ends, the Department and the taxpayer are in the same position that they were before the tolling period began. Each party will then be subject to the unadorned three year statute of limitations in section 95.091(3) that requires the Department to “determine and assess” each taxable month within three years of the date the return was due.

The tolling provision of section 213.345 allows the Department to assess tax for a three year period, based on the date of the Notice of Intent to Audit, if the Department issues its final assessment within one year of sending the Notice. If the Department does not issue the final assessment within that year, the statute of limitations should be calculated as if the tolling period had never occurred.

The author invites counter-arguments and commentary on this important, and unsettled, point of law.

About the author: *Steven M. Hogan is an attorney with Ausley McMullen in Tallahassee, Florida. His practice focuses on tax litigation, commercial litigation, and commercial drone law. Mr. Hogan serves as co-director of the Tax Section’s State Tax Division, and as an adjunct professor at the Florida State University College of Law.*

(Endnotes)

1. This result logically follows when sections 95.091(3) and 212.11(1) are applied together. A different result occurs when the Department and the taxpayer agree to extend the limitations period. Such agreements are memorialized by executing Form DR-872. On the form, the Department and Taxpayer agree on a single date that represents the “end” of the limitations period applicable to the entire audit period. This transforms the “rolling” limitations periods that arise under the statutes into a single one applicable to all 36 months under audit. See *Verizon Business Purchasing, LLC v. State, Dept. of Revenue*, 164 So. 3d 806, 812-13 (Fla. 1st DCA 2015) (statute of limitation extension agreement applied to the entire 36-month audit period, not just to the first month of the audit period).

2. This is so because if the Department does not start the audit within 120 days, section 213.345 states that the tolling period “shall terminate.” § 213.345, Fla. Stat.

