TAX PENALTIES AFTER VMOB: WHAT TO KNOW AND HOW TO FIGHT BACK

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Tax

A 2020 decision from the Second District Court of Appeal drastically changed how tax penalties work in Florida. The case, *VMOB, LLC v. Florida Department of Revenue*, 292 So. 3d 23 (Fla. 2d DCA 2020), has far-reaching implications for taxpayers faced with personal liability assessments under F.S. §213.29.

This article's primary purpose is to explain what *VMOB* did and why its decision is so potentially hazardous to taxpayers who are unaware of it. The secondary purpose is to provide a counter-argument to the conclusions reached by *VMOB* so that if a court reviews the matter in the future, a different result might be obtained.

The Issue in *VMOB*: Personal Liability Assessments

Under F.S. §213.29, the Florida Department of Revenue can hold an officer or director of a company personally responsible for the company's tax liability if it finds that the officer or director acted to "willfully evade or defeat" the tax.[1] The statute does this by authorizing the department to issue a personal liability penalty against the responsible business actor "equal to twice the total amount of the tax evaded or not accounted for or paid over."[2] For example, if the department finds that a business actor willfully evaded a $100,000 business tax payment, the department may issue a $200,000 penalty against the responsible business actor.

However, §213.29 also has an abatement provision that provides that "the [penalty] imposed hereunder shall…be abated to the extent that the tax is paid."[3] The question in *VMOB* is what this abatement provision actually means.

Traditionally, the abatement provision of §213.29 was read to mean that the penalty was abated in proportion to the tax amount paid. Taking the example above, if the taxpayer who owed $100,000 and received a $200,000 penalty paid off the $100,000 in tax, the $200,000 penalty would be abated in full. Effectively, because the penalty is twice the business tax liability, when $1 is paid towards the tax, the penalty is abated by $2.[4] This

traditional interpretation works out to a 1:2 abatement ratio, where every dollar in tax will eliminate $2 in penalty. As discussed below, both parties in *VMOB* briefed the case with this idea in mind.

Despite this, the Second District Court of Appeal in *VMOB* came to a different conclusion. The Second DCA held that the abatement provision in §213.29 operates as a 1:1 abatement ratio, where every $1 in tax paid abates only $1 in penalty.[5] A 1:1 abatement ratio means that the taxpayer referenced above who faces a $200,000 penalty cannot eliminate it by paying the underlying tax — the best the taxpayer can do is reduce the $200,000 penalty to $100,000 by paying the underlying tax.

Accordingly, the Second DCA interpreted §213.29 such that half of every personal liability penalty assessment is "unabateable" by payment of the tax despite the language of the statute. Based on the historical function of the statute, this article shows that the Second DCA's interpretation of the statute is not a reasonable interpretation.

The Facts of *VMOB* and Arguments of the Parties

Before delving into the Second DCA's conclusions, it is instructive to review the facts that led to the decision and the arguments made by the parties. Specifically, it is important to illustrate that neither party took the position that the Second DCA ultimately articulated.

In 2017, the department issued a penalty against Ms. Bartlett, the managing member and registered agent of VMOB, LLC.[6] The department's notice identified business tax due but unpaid amounting to $40,530.02, resulting in a penalty of $81,060.04 — double the unpaid tax amount.[7] Ms. Bartlett exercised her right to a hearing and was referred to the Department of Administrative Hearings (DOAH).[8] While the case was pending, VMOB made substantial payments against its $40,530.03 balance, and only $8,790.56[9] was outstanding when DOAH heard the case.[10]

At DOAH, Ms. Bartlett argued that the penalty amount should be limited to twice the outstanding balance *at the time of the hearing*, which would have been $17,581.12.[11] The ALJ disagreed and recommended the department issue a final order imposing a penalty against Ms. Bartlett of $81,060.04, twice the amount that was not paid when due.[12]

On appeal, Ms. Bartlett repeated the argument she made at DOAH — that VMOB made substantial payments towards the taxes that were the subject of the penalty before the DOAH hearing, so the penalty should have been limited to twice the outstanding tax

balance at the time of the DOAH hearing: $17.581.12.[13] She argued that §213.29 supports this conclusion in two ways.

First, Ms. Bartlett argued that she could not be liable for $81,060.04 if her business only owed $8,790.56 because the language of §213.29 provides that her penalty is limited to "twice the total amount" not "paid over."[14] Thus, pragmatically, if VMOB owes an amount not "paid over" of $8,790.56, her penalty should be limited to twice that amount — $17,581.12.[15]

Second, Ms. Bartlett noted that the statute provided the penalty "shall be abated to the extent that the tax is paid."[16] VMOB's original amount due was $40,530.02, and the ALJ found that $31,779.06 had been paid, leaving a balance of $8,790.56.[17] Therefore, again, Ms. Bartlett's penalty is limited to twice $8,790.56, which is $17,581.12.[18]

The department offered a different interpretation of the statute. In its answer brief, the department argued that Ms. Bartlett's penalty should be abated once the tax has been paid *in its entirety*.[19] Thus, although VMOB made payments that decreased its outstanding balance during the pendency of Ms. Bartlett's case with DOAH, the department argued that the statute's language — "shall be abated to the extent that the tax is paid" — supports its position that Ms. Bartlett's penalty should not decrease along with the business's outstanding tax balance.[20] Instead, the penalty should only be extinguished once the business pays its balance entirely.[21]

While Ms. Bartlett and the department presented differing views about the *amount* of the penalty that should survive past the DOAH hearing, both arguments have a commonality: They support a 1:2 abatement ratio. Although Ms. Bartlett's arguments do this rather candidly, this *1:2 abatement ratio* still exists in the department's argument because the department argued that the Ms. Bartlett's penalty should only be abated *once* the business *completely* satisfies its tax obligation. Effectively, this supports a 1:2 abatement ratio since for every $1 paid towards the business tax obligation, the penalty will decrease by $2.

The only functional difference between Ms. Bartlett's arguments and the department's argument is *when* this abatement clause may function. Ms. Bartlett argues that it can function any time before the DOAH hearing, whereas the department presents a dichotomy — it either functions when the business tax obligation is completely satisfied or not at all. Nevertheless, both parties' arguments support a 1:2 abatement ratio.

The *VMOB* Decision

Even though the parties' briefs supported a 1:2 abatement ratio under §213.29, the Second DCA decided otherwise. Thus, the entire *VMOB* opinion can be summarized in a single phrase: §213.29 provides a 1:1 abatement ratio.

The court began with the total amount the department assessed against Ms. Bartlett, which was $81,060.04.[22] It then noted that VMOB had paid $31,779.06.[23] Thus, under the plain meaning of the abatement provision, as the court understood it, Ms. Bartlett's initial penalty amount of $81,060.04 should have been decreased by the amount that the business had paid, $31,779.06, thus abating the penalty balance to $49,280.98.[24]

The court addressed the arguments that Ms. Bartlett and the department presented and noted that their arguments were not supported by a reasonable reading of the statutory text.[25] In Ms. Bartlett's view, the court noted, the maximum penalty allowed could never exceed twice the outstanding balance.[26] The court argued that this interpretation would negate other parts of the statute, such as the statute's punitive purpose and effect because the statute "imposes a penalty for the willful failure to 'pay over' a tax and for willful attempts to 'evade' or 'defeat' a tax."[27] Therefore, in its view, §213.29 does not limit the penalty amount as long as *some amount* of the outstanding tax balance is paid since the statute, in the court's view, has a punitive purpose.[28] The court also noted that this interpretation would negate the abatement provision because the abatement provision's effect would be unneeded if the penalty amount is always capped at twice the outstanding tax balance.[29]

The court also addressed Ms. Bartlett's second argument that the penalty "shall be abated to the extent that the tax is paid." The court implicitly found this provision in §213.29 to mean that the business tax payment reduces, or abates, the penalty by a 1:1 ratio and dismissed this argument as "treat[ing] the penalty as being the same amount as the tax."[30]

Regarding the department's argument, the court noted the department's argument was flawed because it "falter[ed] on the statute's unambiguous command that a penalty assessed pursuant to the statute 'shall be abated to the extent that the tax is paid.'"[31] Thus, the amount paid towards the tax ($31,779.06) — upon which the penalty is based — operates to decrease the amount of Ms. Bartlett's penalty from $81,060.04 to $49,280.98.[32]

The Traditional Interpretation is the Better Interpretation

While the Second DCA uses textualist reasoning to purportedly support its opinion, it is revolutionary that the result of the court's analysis endorses a 1:1 abatement ratio — something never before read into the statute. The traditional interpretation of a 1:2 abatement ratio is the better reading of the statute.

In *VMOB*, the Second DCA interpreted the phrase, "[t]he penalty imposed…shall be abated to the extent that the tax is paid" to mean that "the amount paid towards the tax abates the [p]enalty amount in a 1:1 ratio," but that is not what the statute commands.

First, the statute's modifier is unclear as to what the "extent" is, meaning it is unclear what precisely abates the penalty other than the "extent" that the business pays the tax. Here, "extent" does not automatically mean "amount"; "extent" is equally likely (or *more* likely) to mean "proportion," and the court neglected to address this. This perspective is reasonable too. For example, if a business pays its outstanding tax debt by 50%, then the business actor's penalty should be abated by the same *proportion*: 50%. Thus, this reasoning supports a 1:2 abatement ratio.

It also must be understood that the abatement language in §213.29 has existed in its current form since the statute was enacted in 1985. However, a significant change in 1992 left the abatement language as-is but increased the penalty amount from 100% of the tax amount due to 200% of the tax amount due (the amendment).[33]

Before the amendment, every dollar of tax paid abated the *entire amount* of penalty associated with that dollar of tax. This abatement "ratio," such as it was, amounted to a complete elimination of the penalty to the extent that the tax was ultimately paid. This effect was the genesis of the "traditional" view of abatement under §213.29 referenced above — that the full payment of the underlying tax abated the entire penalty.

The 1992 amendment did nothing to adjust the abatement language — it only raised the penalty amount from 100% to 200%. Accordingly, the "traditional" approach to abatement continued to be applied by the department and tax practitioners throughout Florida.[34]

Despite this, the result of *VMOB* is that when a business pays its past-due taxes, that payment abates the personal penalty by a 1:1 ratio. Implicit in the *VMOB* decision is the idea that the 1992 amendment to §213.29 not only increased the amount of the penalty, but also decreased the efficacy of the automatic abatement language that remained unchanged.

The function of the abatement provision should be interpreted to be the same pre-and post-amendment. Therefore, if the business pays its entire tax debt before the DOAH hearing, the owner should not be liable for any personal penalty because the personal penalty should be abated entirely by the tax payment. This is how the abatement provision functioned pre-amendment. Because the abatement provision was unchanged in the 1992 amendment, it should still function the same way. However, under *VMOB*, even if a business pays 100% of its past-due tax balance, the responsible business actor would *still* be liable for 50% of the original penalty.

Additionally, the Second DCA concluded that a 1:2 ratio interpretation would render the abatement provision "superfluous" because the penalty would merely be double the outstanding business tax owed. However, this is incorrect for two reasons.

First, pre-amendment, this is precisely how the abatement provision would have functioned, and this provision was left unchanged in 1992. Thus, pre-amendment, the penalty *equaled* the outstanding business tax owed, so it would be logical to conclude that post-amendment, it would simply be twice the amount of the outstanding business tax owed.

Second, the penalty would not be "superfluous" at all if it was abated at a 1:2 ratio. The penalty would still decrease as the tax was paid — and a 200% *personal* penalty is certainly an incentive to have the liable business pay its taxes. As noted in the petitioner's and respondent's briefs,[35] not only is a 1:2 ratio reading is a reasonable interpretation of the statute, the amendment supports the parties' interpretation that the abatement provision works to proportionally decrease, by a 1:2 ratio, the personal liability by how much a business pays towards its past-due taxes.

Public Policy Supports the Traditional Interpretation

From a public policy perspective, the abatement provision of section 213.29 is best understood as an incentive for the business owner to ensure that the business pays its past-due tax balance. The penalty is not a criminal "fine" against the business owner.

The *VMOB* decision turns the statutory incentive into something more akin to a punishment that one cannot avoid. The court's interpretation of the abatement provision limits, if not virtually extinguishes, the incentive of a business owner to avoid personal liability by seeing to it that the business pays its past-due balance before the DOAH hearing. The opinion notes that "[i]t is not reasonable to read statutory text in a

way that renders other text in the same statute without meaning or effect."[36] Yet, if this public policy reason holds to be accurate, this court's abatement provision interpretation would functionally nullify the provision's ability to carry out its public purpose.

Before the 1992 amendment, a business actor could essentially escape all personal liability if the business wholly paid the past-due tax amount *before* the DOAH hearing, regardless of whether the statute was interpreted to mean that the tax payment abated the penalty at a 1:2 or 1:1 ratio. This intent was not adjusted in the 1992 amendment; the amendment merely adjusted the penalty amount. Therefore, if a business actor could escape personal liability before the 1992 amendment by ensuring the business pay the entire amount due, that should be the case *after* the amendment, thus, supporting a 1:2 ratio. If the legislature intended to revoke a business actor's ability to extinguish personal liability by seeing to it that the business pays its past-due tax balance, then it had the opportunity to do so in the amendment.

What Now?

Regardless of whether *VMOB* was correctly decided, it is "on the books," and taxpayers grappling with personal liability assessments must consider the case. Generally, taxpayers have two choices when challenging a penalty imposed by the department: a lawsuit in circuit court or a DOAH proceeding under F.S. Ch. 120.[37]

If the taxpayer brings a lawsuit in a circuit court within the Second DCA's jurisdiction, the *VMOB* decision will undeniably bind the trial court.[38]

Similarly, until another DCA addresses the issue, *VMOB* will bind *every* trial court in the state. In this situation, the Florida Supreme Court has noted, "[I]n the event the only case on point on a district level is from a district other than the one in which the trial court is located, the trial court [will] be required to follow that decision."[39] The court reasoned that "[t]he decisions of the district courts of appeal represent the law of Florida unless and until they are overruled by this Court."[40] This concept is well-settled in caselaw.[41]

So, it follows that if a party challenges *VMOB* in another district, that trial court is required to abide by the Second DCA's interpretation of §213.29, unless the district court in which the trial court rests has come to an independent interpretation of §213.29.

This means that the "trial court" strategy for a litigant must involve knowing that the point will lose in trial court, but that a different DCA can come to a new conclusion on appeal.[42]

If the taxpayer chooses a DOAH proceeding instead of circuit court, the ALJ will be bound by *VMOB* unless and until another DCA weighs in on the issue. In *Systems Components Corp. v. Florida Department of Transportation*, 14 So. 3d 967 (Fla. 2009). the Florida Supreme Court highlighted that "[i]n the absence of inter-district conflict or contrary precedent from this Court, it is absolutely clear that the decision of a district court of appeal is binding *throughout Florida*."[43]

This rule has been noted by administrative law judges[44] and the First District Court of Appeal.[45] Therefore, absent an inter-district conflict regarding the interpretation of §213.29, an administrative law judge is bound by the Florida Supreme Court to follow the ruling in *VMOB*.

However, the question for a DOAH litigant is what DCA would hear its appeal? Section 120.68(2)(a) provides that "[j]udicial review shall be sought in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law."[46]

If the law does not provide a specific venue, the appellant or petitioner has the option of filing its notice of appeal in the district where it resides or the district where the agency's headquarters is located. For example, because the Florida Department of Revenue maintains its headquarters in Tallahassee,[47] an appellant or petitioner can always file its appeal in the First DCA.

Fortunately for litigants, the *VMOB* decision came out of the Second DCA and not the First DCA. Therefore, an appeal to the First DCA from an adverse decision from DOAH will offer an opportunity to argue that *VMOB* was wrongly decided and should not control. Alternatively, an appellant or petitioner who resides outside of the Second DCA may choose to file an appeal in the district it resides. In any case, the strategy would be to hope that a DCA other than the Second DCA would look at §213.29 differently than *VMOB*.

Conclusion

Taxpayers and their attorneys must be aware of *VMOB* when addressing a penalty imposed under §213.29. Though *VMOB* is the only binding authority on the issue at the moment, the Second DCA's decision is not without its weaknesses in that it represents a sharp departure from the traditional interpretation of the statute. Future litigation on this subject appears inevitable. Tax practitioners should proceed accordingly when advocating for their clients.

[1] Fla. Stat. §213.29. For a detailed discussion of how evidentiary burdens work in such cases, *see* Steven M. Hogan, *Bursting Bubbles: Evidentiary Presumptions in Personal Liability Assessments*, 92 Fla. B. J. 56 (Apr. 2018).

[2] Fla. Stat. §213.29.

[3] *Id*.

[4] This interpretation of §213.29 is "traditional" in the sense that in the author's experience, and in the experience of every tax attorney the author has inquired with, the department has always treated the abatement provision in this manner. As noted in this article, both parties in *VMOB* briefed the issue with the assumption that a 1:2 abatement ratio would apply.

[5] *See VMOB, LLC v. Dep't of Revenue*, 292 So. 3d 23, 29 (Fla. 2d DCA 2020).

[6] *Id.* at 25.

[7] *Id*.

[8] *Id*.

[9] It appears that the *VMOB* opinion may have a typographical error regarding this amount — it references both "$8,790.56" and "8,750.96." *Id.* at 27. Further, the opinion references "$17,581.12," *id.*, whereas Ms. Bartlett's initial brief references "$17,501.82." Initial Br. of Appellant at 17, *VMOB, LLC v. Dep't of Revenue*, 292 So. 3d 23 (Fla. 2d DCA 2020) (No. 2D18-2723). For consistency purposes, the amounts of $8,790.56 and $17,581.12 will be used throughout this article.

[10] *VMOB*, 292 So. 3d at 25-26.

[11] *Id.* at 26.

[12] *Id*.

[13] *Id.*; Initial Br. of Appellant at 17, *VMOB, LLC v. Dep't of Revenue*, 292 So. 3d 23 (Fla. 2d DCA 2020) (No. 2D18-2723) ("213.29 provides that Ms. Bartlett's liability is limited to 'twice the total amount' not 'paid over.' Therefore, if the amount not 'paid over' is $8,750.96, then Ms. Bartlett's liability is limited to twice $8,750.96, which is $17,501.92.").

[14] *VMOB*, 292 So. 3d at 28; Fla. Stat. §213.29.

[15] *Id.* at 28.

[16] *Id.* at 29; Fla. Stat. §213.29.

[17] *See VMOB*, 292 So. 3d at 25-26, 29.

[18] *Id.*

[19] Answer Br. of Appellee at 16, *VMOB, LLC v. Dep't of Revenue*, 292 So. 3d 23 (Fla. 2d DCA 2020) (No. 2D18-2723) ("Section 213.29, Florida Statutes, provides that the personal liability "shall be abated *to the extent that the tax is paid*." (emphasis added). It is undisputed that the tax had not been paid. Accordingly, the penalty remains the same, unless and until the tax is paid.").

[20] *Id.*

[21] *Id.*

[22] *Id.* at 28.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.* ("That leaves the abatement provision with no work of its own to perform because any reduction of the penalty the abatement provision could offer was already factored into the computation of the penalty as an initial matter. It is not reasonable to read statutory text in a way that renders other text in the same statute without meaning or effect.").

[30] *Id.* at 29.

[31] *Id.* at 27.

[32] *Id.* at 28.

[33] Act effective Jan. 1, 1993, Laws of Fla. Ch. 92-320, §21 (1992) (amending Fla. Stat. §213.29 (1991)).

[34] The briefs of the parties in *VMOB* make this abundantly clear, as both advocated with the expectation of a 1:2 abatement ratio. *See* Answer Br. of Appellee, *VMOB, LLC v. Dep't of Revenue*, 292 So. 3d 23 (Fla. 2d DCA 2020) (No. 2D18-2723); Initial Br. of Appellant, *VMOB, LLC v. Dep't of Revenue*, 292 So. 3d 23 (Fla. 2d DCA 2020) (Case No. 2D18-2723).

[35] *See* Answer Br. of Appellee, *VMOB, LLC v. Dep't of Revenue*, 292 So. 3d 23 (Fla. 2d DCA 2020) (No. 2D18-2723); Initial Br. of Appellant, *VMOB, LLC v. Dep't of Revenue*, 292 So. 3d 23 (Fla. 2d DCA 2020) (Case No. 2D18-2723).

[36] *VMOB*, 292 So. 3d at 29.

[37] *See* Fla. Stat. §72.011. This does not include informal protest proceedings that may be timely elected by the taxpayer. At the close of such proceedings, the taxpayer may still choose to pursue its rights in either circuit court or in DOAH.

[38] *See Pardo v. State*, 596 So. 2d 665, 667 (Fla. 1992) (quoting *State v. Hayes*, 333 So. 2d 51, 53 (Fla. 4th DCA 1976)) ("[I]f the district court of the district in which the trial court is located has decided the issue, the trial court is bound to follow it.").

[39] *Id.* at 666 (quoting *Hayes*, 333 So. 2d at 53).

[40] *Stanfill v. State*, 384 So. 2d 141, 143 (Fla. 1980).

[41] *See, e.g.*, *Mercury Ins. Co. of Florida v. Coatney*, 910 So. 2d 925, 926 (Fla. 1st DCA 2005) ("Because there was no decision from this court on point, the trial court was required to follow the Second District...."); *Gross v. State*, 765 So. 2d 39, 48 (Fla. 2000) (Anstead, J., concurring); *Bane v. Bane*, 750 So. 2d 77, 78 (Fla. 2d DCA 1999) ("Because there was no decision by the Second District on this issue, the trial court was bound to follow the Fourth District's opinion."), *approved*, 775 So. 2d 938 (Fla. 2000).

[42] This is exactly the strategy the state of South Dakota used in *S. Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018), in that they knew they would lose at trial and hoped for a victory in the U.S. Supreme Court. As it turns out, that strategy was fabulously successful.

Steven M. Hogan and Alan J. LaCerra, *South Dakota v. Wayfair: The Case That Changes Everything*, 93 Fla. B. J. 22 (Mar./Apr. 2019) (noting that Justice Kennedy invited such a strategy, and that South Dakota took him up on it).

[43] *Systems Components Corp.*, 14 So. 3d at 967 n.4 (citing *Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992)).

[44] *Fla. Horsemen's Benevolent and Prot've Ass'n, Inc., v. Dep't of Bus. and Prof'l Regulation*, Case. Nos. 19-1617, 19-2860U (Fla. DOAH Feb. 18, 2020) (Recommended Order) ("It is within these parameters set forth by the district courts that these cases must be determined, as these cases are binding on this tribunal.") (citing *Weiman v. McHaffie*, 470 So. 2d 683, 684 (Fla. 1985); *Keystone Peer Review Org., Inc. v. State, Agency for Health Care Admin.*, 26 So. 3d 652, 654 (Fla. 1st DCA 2010); *Pardo v. State*, 896 So. 2d 665, 666 (Fla. 1992)).

[45] *Keystone Peer Review Org.*, 26 So. 3d at 654 (holding that if the ALJ determines that a contract is exempt from a statutory hearing process, the ALJ *must* dismiss the petition and protest because of a Second District Court of Appeal decision).

[46] Fla. Stat. §120.68(2)(a). The First District Court of Appeal is the exclusive venue for certain types of administrative appeals. *See, e.g.,* Fla. Stat. §440.271 (orders issues by judges of compensation claims under workers' compensation law); Fla. Stat. §631.021(4) (delinquency proceedings under Insurers Rehabilitation and Liquidation Act).

[47] *Dep't of Revenue v. First Fed. Sav. & Loan Ass'n of Fort Myers*, 256 So. 2d 524, 525 (Fla. 2d DCA 1971) (noting that the Florida Department of Revenue's official headquarters is in Leon County).

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