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In this edition of Florida Tax Today, Hogan argues that the Florida Department of Revenue and taxpayers should both be subject to the same rules under a harmonious construction of the state's three-year statute of limitations and tolling statute, thereby limiting the DOR to three years to conduct a sales and use tax audit.

Because 78 percent of Florida's general revenue comes from sales and use taxes,[1] the Department of Revenue often audits businesses for sales and use tax compliance.

The DOR normally opens a three-year audit period when examining a taxpayer's sales and use tax compliance — which makes sense given the state's three-year statute of limitations on tax assessments.[2] In most cases, that three-year period is tolled for one year after the department starts its audit.[3]

The interaction between the tolling statute and the limitations period makes the three-year (36-month) audit period unique and fraught with pitfalls for the state. Taxpayers must be aware of how that interaction can affect the state's assessment power.

Each Month's Limitations Period

The three-year statute of limitations is tied to the date that a tax return is due or filed, "whichever occurs later."[4] In the context of sales and use tax, most taxpayers file returns monthly[5] — with each return carrying its own three-year limitations period.

Because of that, when the department opens a three-year audit period consisting of 36 separate months, there are normally 36 separate limitations periods at issue.

This dynamic is best illustrated with a mental picture. Visualize a drawing in which each of the 36 months is shown in a stair step formation, with the top step as the oldest month and the lowest step as the most recent. Then imagine a string hanging down from the top step, representing the three-year limitations period applicable to that month. Now imagine a string of the same length hanging from the second step. Do the same for the rest of the steps, down to the bottom one. This visualization shows how the limitations periods for each month in the audit period begin and end at different times.

A different result occurs when the DOR and the taxpayer agree to extend the limitations period. Those agreements are memorialized by

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[1] Florida Revenue Estimating Conference, "Sources of General Revenue FY 2016-2017," *2017 Florida Tax Handbook*, at 16. Sales and use tax accounted for 78 percent of Florida's fiscal 2017 general revenue.

[2] Fla. Stat. section 95.091(3)(a)1.b.

[3] Fla. Stat. section 213.345.

[4] Fla. Stat. section 95.091(3)(a)1.b.

[5] Fla. Stat. section 212.11(1)(b). Taxpayers with low sales volumes may only have to file their returns quarterly, semiannually, or annually. Fla. Stat. section 212.11(1)(c).

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executing Form DR-872, on which the department and taxpayer agree on a single date representing the end of the limitations period applicable to the entire audit period. That transforms the cascading limitations periods arising under the statutes into one applicable to all 36 months under audit.[6]

Those agreements, however, are exceptions to the rule. Because an audit normally commences and concludes without the execution of a Form DR-872, the taxpayer and the auditor both have to contend with the cascading limitations periods flowing from each of the 36 months.

That leads to a problem: If the three-year limitations period applies to the first month of the audit, and the first month of the audit is three years back from the date the audit begins, then the auditor has to assess that month immediately to avoid a time-barred assessment. Luckily for the DOR, the statutes contain a work-around for that problem.

Tolling the Statute of Limitations

Section 213.345, Florida Statutes, provides that the three-year limitations period on tax assessments "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."[7]

The tolling provision prevents the statute of limitations from running out for one year after a Notice of Intent to Audit is issued. Because of that, the DOR can use the tolling provision to audit 36 months of returns despite the statute of limitations.

The tolling provision's scope is limited, however. The DOR must begin the audit within 120 days after issuing a Notice of Intent to Audit, unless the taxpayer requests a delay.[8] If the department does not start the audit within 120 days, the tolling period terminates unless the taxpayer and the department agree on an extension. The DOR must therefore commence the audit within four months (120 days) to benefit from the full one-year tolling period.[9]

Things get interesting, though, when one ponders what the one-year tolling period means. For example, what happens when the tolling period ends? Does the three-year limitations period pause during the tolling period and restart after a year goes by? Would that effectively make the limitations period four years instead of three?

Or does the tolling period simply stop the effect of the limitations period while it is in force? Would that mean that after the one-year tolling period ends, the DOR is cut off from assessing the first 12 months of the audit period?

This article posits that when a taxpayer is not assessed within the one-year tolling period, the DOR 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 issues relevant to their cases.

Do Tolling Periods Add to Statutes of Limitations?

The question whether tolling periods add time to statutes of limitations is surprisingly underdeveloped in Florida law. Absent specific authority, some general principles and related case law can shed light on the issue.

Florida common law requires courts to construe tax statutes strictly against the taxing authority. All ambiguities must be resolved in favor of the taxpayer. This well-settled principle has been applied to questions regarding statutes of limitations on tax assessments.[10]

This principle guides analysis of case law addressing tolling concepts in Florida law. Essentially, if an inference is to be drawn, it should be drawn against the state's ability to assess tax against the taxpayer. Therefore, a construction of the statute that shrinks the audit period should be favored, while a construction that expands the audit period should be disfavored.

In light of that principle, an examination follows of two potentially relevant cases.

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[6] *See Verizon Business Purchasing LLC v. State Department of Revenue*, 164 So. 3d 806, 812-13 (Fla. Dist. Ct. App. 2015) (statute of limitations extension agreement applied to the entire 36-month audit period, not just to the first month of the audit period).

[7] Fla. Stat. section 213.345.

[8] *Id.*

[9] *Id.*

[10] *Verizon Business Purchasing*, 164 So. 3d at 809 (citing the principle of law; applying a strict construction to statutes of limitations on tax assessments). A corresponding principle teaches that tax exemptions are to be strictly construed against the taxpayer.

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Tolling Under *Ramirez* and *Harris Corp.*

The Florida Third District Court of Appeal addressed tolling and statutes of limitations in *Ramirez v. McCravy*.[11]

Ramirez was not a tax case, but involved a personal injury claim filed three days after a statute of limitations ended.[12] While the statute of limitations was running on the plaintiff's claim, five hurricanes and one tropical storm hit Florida.[13] To assist the administration of justice during that time, 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.[14]

The plaintiff argued that administrative orders added "extra days" to the limitations period applicable to his claim.[15] The Third District rejected that argument, holding that "to 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."[16]

The supreme court initially granted review of the *Ramirez* case, but would later relinquish jurisdiction in *Ramirez v. McCravy*.[17] After the opinion relinquishing jurisdiction, Justice Barbara J. Pariente wrote a concurring opinion approving of the Third District's decision:[18]

> The 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.[19]

The *Ramirez* cases are instructive, indicating that tolling a limitations period does not add extra time to its end. Rather, the tolling principle allows a litigant to file suit within the tolling period when that action would otherwise be time-barred.

The same rule should follow in tax cases. Viewed properly, the tolling period under section 213.345 acts as a time when the DOR can assess tax against a taxpayer when that kind of assessment would otherwise be time-barred.

If that was not the case, section 213.345 would add on an extra year to the limitations periods applicable to each month in an audit period, as long as the DOR commences the audit within 120 days.[20] That construction of the statute would help the department while hurting taxpayers. Such a construction is therefore counter to the common law requirement to strictly construe ambiguities in state tax statutes against the government's position.

Support for the taxpayer-friendly interpretation of section 213.345 is found in *Harris Corp. v. Department of Revenue*.[21] *Harris Corp.* addressed whether the DOR'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.[22]

The tolling provision considered in *Harris Corp.* was found in section 95.091(3), Florida Statutes (1979). The provision stated:

> 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

[11] 4 So. 3d 692 (Fla. Dist. Ct. App. 2009).

[12] *Ramirez*, 4 So. 3d at 692.

[13] *Id.* at 693.

[14] *Id.*

[15] *Id.*

[16] *Id.*, at 694.

[17] 37 So. 3d 240, 240 (Fla. 2010).

[18] *Ramirez v. McCravy*, 37 So. 3d at 241.

[19] *Id.*, at 242.

[20] That is so because if the DOR does not start the audit within 120 days, section 213.345 states that the tolling period "shall terminate." Section 213.345, Fla. Stat.

[21] 409 So. 2d 91 (Fla. Dist. Ct. App. 1982).

[22] *Harris Corp.*, 409 So. 2d at 92.

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and records has been made by the taxing authority.[23]

The assessment in *Harris Corp.* was issued two years and five months after the DOR notified the taxpayer of its intent to conduct an audit. 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. In effect, the DOR's position in *Harris Corp.* was that the tolling period extended the limitations period from three years to five.[24]

The Florida First District Court of Appeal rejected that argument. The court of appeal linked the tolling provision to the DOR's duty to complete the audit "within that period" that the tolling provision covered. If the department did complete the audit within the tolling period, then the limitations period would be calculated as three years from the date the DOR issued its notice of intent to audit.[25]

Because the DOR 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."[26]

The modern tolling provision in section 213.345 is like the one construed 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." The modern statute also provides that the tolling provision would automatically terminate if the audit does not begin within the initial 120-day period. That language is like the admonition in section 95.091(3) (1979) that the tolling period applies only if the DOR completed its inspection within the tolling period.[27]

The court's reasoning in *Harris Corp.* should be followed when construing the modern tolling statute. A court examining the application of modern section 213.345 should hold that the statute of limitations reverts to the original three-year period if the department does not begin its audit within 120 days. Because this period is calculated from the date of the assessment itself, any assessment for months occurring more than three years before the assessment date would be time-barred.

The same result follows under the *Ramirez* cases. Recall that in *Ramirez*, the Third District held that when a limitations period has been tolled, the tolling does not *extend* the limitations period. Instead, the tolling period serves to protect the right to bring an action *during* the tolling period when the statute of limitations would have otherwise run.

These cases lead to the conclusion that the tolling period under section 212.345 does not extend the limitations periods on tax assessments. The tolling period instead allows the DOR to assess tax during the tolling period when those assessments would otherwise have been time-barred.

Conclusion

A harmonious construction of the statute of limitations and the tolling statute leads to the conclusion that when the tolling period ends, the DOR 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 author invites counterarguments and commentary on this important point of law. ■

[23] *Id.* (emphasis added; quoting Fla. Stat. section 95.091(3). (1979)).

[24] *Id.*

[25] *See id.*

[26] *Id.*, at 92-93.

[27] *Id.*

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