IN THIS ISSUE:

Message from the Chair: .......................................................... 3
Florida’s Water Crises: Can We Afford the Solutions? (Part II) ................................................................. 7
For Whom Does the Period Toll? Statutes of Limitations in Florida Tax Audits ........................................... 8
Due Process Nexus Arguments Supported by Recent Florida Personal Jurisdiction Cases (Part 2) .............. 11
Tax Court Sides with Taxpayer in Non-Safe-Harbor Reverse Like-Kind Exchange Transaction .................. 13
Estate Tax Planning for Royalties: Not Just For Celebrities ........................................................................ 14

Cover photo: by Randy Traynor
www.randytraynorphotography.com

The Florida Bar Tax Section
2016-2017 Meeting Locations and Dates

2017 Directors Meeting
Villagio Inn & Spa, Yountville, CA - March 2-5, 2017

2017 Tax Annual Meeting
The Breakers, Palm Beach - May 4-7, 2017

2017 Organizational Meeting
Omni, Amelia Island - June 30 - July 4, 2017
Chair’s Message
By: William R. Lane, Jr.
Chair, Florida Bar Tax Section 2016-2017

Dear Colleagues:

Enclosed herewith is the Winter 2016-2017 Tax Section Bulletin. I trust you will find the articles addressing both state and federal issues to be informative and helpful to your practices. Greg McLaughlin is editing the Bulletin this year and he and his editorial partners, past Chair Guy Whitesman and Long Range Planning Committee Chair, Janette McCurley, are doing an outstanding job.

As we close out 2016, I would like to thank the planning committee (Jason Havens, Greg Marks, Steve Salley, Shawn Wolf) for the Tax Section’s Advanced CLE program held in conjunction with our Fall Meeting in St. Petersburg. They produced an outstanding income tax planning program oriented toward the operations and ownership transitions of family-owned businesses, which are the backbone of Florida’s economy.

Looking toward the second half of the Section’s fiscal year, we have a line-up of outstanding in-person, free-standing CLE programs starting with the International Tax Conference (ITC) held in Miami in early January and followed in quick succession throughout the spring by state and federal tax programs. These programs will be joined by an advanced tax procedures and controversies CLE program presented in conjunction with the Section’s Annual Meeting on Friday, May 5th, 2017 in Palm Beach at the Breakers. This is the meeting at which the Section also will honor the 2016-2017 Tax Attorney of the Year, David Bowers on Saturday evening, May 6th. Be sure to mark your calendars. This looks to be a great Annual Meeting.

We have been fortunate that the Section’s “Phone CLE Tsar” Mike O’Leary once again has assembled an outstanding roster of noon start time, 1 hour CLE programs for this year. As I write this in early November, our phone CLE programs, offered at no cost to Section members, thus far have averaged in excess of 125 attendees during the first half of our fiscal year. Still to be presented are a number of excellent programs including topics such as federal and state tax procedure, and federal estate, corporate and partnership tax planning.

Planning for the Section’s annual Tax Moot Court Competition is well underway, with the program to be held at the Tradewinds Resort in St. Pete Beach from February 2 - 4, 2017. Tax Court Judges Carluzzo, Guy and Dean will judge the semifinal and final rounds. Please contact Justin Wallace and Brian Howsare to volunteer.

Recently the Section collaborated with the Real Property, Probate and Trust Law Section of The Florida Bar to submit comments to the Treasury regarding the proposed Section 2704 regulations. Tax lawyers young and not so young, and dispersed over the State, collaborated on this project, which was organized largely through the efforts of your Chair-elect, Joe Schimmel. Thank you, Joe. Also, the “final say” on the Comments prior to their submission rested in the capable hands of past Tax Section and RPPTL Section Chair Ed Koren. Thank you, Ed! The Comments are available for review on the Section’s website, floridataxlawyers.org.

Our Section is fortunate to have sponsors who take interest in our practices, and who hope to work with you in your practices as you collaborate with them to assist your clients. I was pleased to see the turnout of the Section’s sponsor representatives at the Fall Meeting in St. Petersburg. Thank you Platinum Sponsor MPI, and Silver Sponsors Bernstein, BVA, Coral Gables Trust, MRW, Jones Lowry, Kaufman Rossin, and Wilmington Trust!

With the approaching holidays, I hope that you will find time to enjoy your families and our State’s wonderful winter weather.

William R. Lane, Jr.
Chair, Florida Bar Tax Section 2016-2017
Tax Section Fall Meeting 2016

[Images of people at a meeting and dining tables]
## Tax Section/Financial Operations

<table>
<thead>
<tr>
<th>REVENUE</th>
<th>2015-2016 Budget</th>
<th>2015-2016 Actual</th>
<th>2016-2017 Budget</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section Dues</td>
<td>117,780</td>
<td>117,230</td>
<td>117,000</td>
</tr>
<tr>
<td>Affiliate Dues</td>
<td>1,200</td>
<td>1,025</td>
<td>1,000</td>
</tr>
<tr>
<td>Registrations</td>
<td>57,340</td>
<td>56,019</td>
<td>72,160</td>
</tr>
<tr>
<td>CLE Committee Courses</td>
<td>45,000</td>
<td>50,240</td>
<td>63,000</td>
</tr>
<tr>
<td>Cospons Share</td>
<td>3,000</td>
<td>9,458</td>
<td>3,000</td>
</tr>
<tr>
<td>NonSection Member Differential</td>
<td>10,000</td>
<td>11,405</td>
<td>0</td>
</tr>
<tr>
<td>Sponsorships</td>
<td>46,744</td>
<td>33,312</td>
<td>46,744</td>
</tr>
<tr>
<td>Board/Council Meeting Registration</td>
<td>0</td>
<td>651</td>
<td>0</td>
</tr>
<tr>
<td>Moot Court</td>
<td>12,000</td>
<td>9,821</td>
<td>0</td>
</tr>
<tr>
<td>Investment Allocation</td>
<td>11,445</td>
<td>(12,566)</td>
<td>14,247</td>
</tr>
<tr>
<td><strong>TOTAL REVENUE</strong></td>
<td><strong>304,509</strong></td>
<td><strong>276,595</strong></td>
<td><strong>317,151</strong></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>EXPENSE</th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Credit Card Fees</td>
<td>980</td>
<td>1,648</td>
<td>980</td>
</tr>
<tr>
<td>Staff Travel</td>
<td>6,200</td>
<td>7,295</td>
<td>4,685</td>
</tr>
<tr>
<td>Equipment Rental</td>
<td>0</td>
<td>3,534</td>
<td>0</td>
</tr>
<tr>
<td>Phone/Direct</td>
<td>850</td>
<td>1,284</td>
<td>660</td>
</tr>
<tr>
<td>Internet Charges</td>
<td>384</td>
<td>458</td>
<td>400</td>
</tr>
<tr>
<td>Promo Printing</td>
<td>900</td>
<td>156</td>
<td>900</td>
</tr>
<tr>
<td>Promo Mailing</td>
<td>1,950</td>
<td>0</td>
<td>1,450</td>
</tr>
<tr>
<td>Postage</td>
<td>660</td>
<td>1,860</td>
<td>1,750</td>
</tr>
<tr>
<td>Printing</td>
<td>1,600</td>
<td>2,707</td>
<td>2,800</td>
</tr>
<tr>
<td>Newsletter</td>
<td>4,000</td>
<td>3,123</td>
<td>4,000</td>
</tr>
<tr>
<td>Supplies</td>
<td>400</td>
<td>494</td>
<td>400</td>
</tr>
<tr>
<td>Photocopying</td>
<td>225</td>
<td>151</td>
<td>225</td>
</tr>
<tr>
<td>Officers Travel Expense</td>
<td>0</td>
<td>46</td>
<td>0</td>
</tr>
<tr>
<td>CLE Speaker Expense</td>
<td>1,500</td>
<td>1,389</td>
<td>5,000</td>
</tr>
<tr>
<td>Reception</td>
<td>33,000</td>
<td>36,587</td>
<td>47,000</td>
</tr>
<tr>
<td>Luncheons</td>
<td>10,500</td>
<td>4,731</td>
<td>13,000</td>
</tr>
<tr>
<td>Family Dinner</td>
<td>23,000</td>
<td>19,575</td>
<td>20,000</td>
</tr>
<tr>
<td>Golf Tournament Expense</td>
<td>0</td>
<td>0</td>
<td>2,500</td>
</tr>
<tr>
<td>Committee Expense</td>
<td>2,100</td>
<td>2,917</td>
<td>3,250</td>
</tr>
<tr>
<td>Board or Council Meeting</td>
<td>12,000</td>
<td>23,146</td>
<td>1,500</td>
</tr>
<tr>
<td>Entertainment Expense</td>
<td>12,500</td>
<td>8,564</td>
<td>17,500</td>
</tr>
<tr>
<td>Hospitality Suite</td>
<td>13,850</td>
<td>13,993</td>
<td>11,500</td>
</tr>
<tr>
<td>New Tax Attorney Lunches</td>
<td>800</td>
<td>800</td>
<td>1,500</td>
</tr>
<tr>
<td>AV Equipment</td>
<td>8,200</td>
<td>9,554</td>
<td>8,200</td>
</tr>
<tr>
<td>Section Membership Directory</td>
<td>20,000</td>
<td>11,391</td>
<td>1,000</td>
</tr>
<tr>
<td>Awards</td>
<td>2,000</td>
<td>2,702</td>
<td>2,000</td>
</tr>
<tr>
<td>EXPENSE</td>
<td>2015</td>
<td>2016</td>
<td>2017</td>
</tr>
<tr>
<td>---------------------------------------</td>
<td>---------</td>
<td>---------</td>
<td>---------</td>
</tr>
<tr>
<td>Scholarships</td>
<td>10,000</td>
<td>10,000</td>
<td>10,000</td>
</tr>
<tr>
<td>Fellowships-Executive Council</td>
<td>7,000</td>
<td>7,623</td>
<td>7,000</td>
</tr>
<tr>
<td>Website</td>
<td>10,000</td>
<td>8,918</td>
<td>10,000</td>
</tr>
<tr>
<td>Council of Sections</td>
<td>300</td>
<td>300</td>
<td>300</td>
</tr>
<tr>
<td>Amicas Curiae</td>
<td>1,000</td>
<td>886</td>
<td>1,000</td>
</tr>
<tr>
<td>National Tax Moot Court</td>
<td>17,000</td>
<td>21,142</td>
<td>17,000</td>
</tr>
<tr>
<td>National Multistate Tax Symposium</td>
<td>150</td>
<td>0</td>
<td>150</td>
</tr>
<tr>
<td>Operating Reserve</td>
<td>0</td>
<td>0</td>
<td>10,958</td>
</tr>
<tr>
<td>Miscellaneous</td>
<td>2,620</td>
<td>3,193</td>
<td>3,120</td>
</tr>
<tr>
<td>Speakers Meals</td>
<td>0</td>
<td>100</td>
<td>0</td>
</tr>
<tr>
<td>Speakers Hotel</td>
<td>0</td>
<td>338</td>
<td>0</td>
</tr>
<tr>
<td>Outline Prt-Inhouse</td>
<td>0</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>Course Credit Fee</td>
<td>150</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Meeting Room Rent</td>
<td>0</td>
<td>2,000</td>
<td>0</td>
</tr>
<tr>
<td>Meeting Meals</td>
<td>27,500</td>
<td>28,613</td>
<td>36,500</td>
</tr>
<tr>
<td>Refreshments Breaks</td>
<td>7,500</td>
<td>17,018</td>
<td>10,000</td>
</tr>
<tr>
<td>Meeting Rooms/Attrition</td>
<td>0</td>
<td>7,238</td>
<td>0</td>
</tr>
<tr>
<td>Section Management Fee</td>
<td>37,677</td>
<td>37,909</td>
<td>37,810</td>
</tr>
<tr>
<td><strong>TOTAL EXPENSE</strong></td>
<td>278,496</td>
<td>303,385</td>
<td>296,038</td>
</tr>
</tbody>
</table>

| BEGINNING FUND BALANCE                | 387,071 | 391,254 | 474,905 |
| PLUS REVENUE                          | 304,509 | 276,595 | 317,151 |
| LESS EXPENSE                          | (278,496) | (303,385) | (296,038) |
| ENDING FUND BALANCE                   | 413,084 | 364,464 | 496,018 |

**SECTION REIMBURSEMENT POLICIES:**

General: All travel and office expense payments are in accordance with Standing Board Policy 5.61.

Travel expenses for other than members of Bar staff may be made if in accordance with SBP 5.61(e)(5)(a)-(i) or 5.61(e)(6) which is available from Bar headquarters upon request.
FLORIDA’S WATER CRISIS: CAN WE AFFORD THE SOLUTIONS? (PART II)

By: Dana M. Apfelbaum, Brad Gould, and Michael D. Minton

Dean, Mead, Minton & Zwemer

Fort Pierce, Florida

With the renewed focus on water projects due to discharges from Lake Okeechobee and a recent surge in blue/green algae, there is also a renewed effort to involve private interests in the development of these projects. This series of articles addresses exceptions to the general rule that government payments received by private landowners as a part of water projects are included in gross income. In our first article, we explored the opportunities afforded by § 118 (all references to sections are to the Internal Revenue Code of 1986, as amended, unless otherwise noted) for corporations. This article will address an exception potentially applicable to all taxpayers.

Section 126(a) provides a list of several federal and state subsidy payments that are excluded from gross income if and to the extent they: (1) are “made primarily for the purpose of conserving soil and water resources, protecting or restoring the environment, improving forests, or providing a habitat for wildlife,” as determined by the Secretary of Agriculture; (2) do not substantially increase the annual income derived from the property, as determined by the IRS; and (3) are for capital improvement(s). No deduction or credit is allowable for expenditures financed by these excludable subsidies. Furthermore, such expenses cannot be included in the basis of the benefited property. Section 126 is an optional provision requiring affirmative election by the taxpayer.

For a more complete analysis of the types of water projects in Florida that already do or could qualify, please see the complete version of this article on our blog at http://www.deanmead.com/category/water-law/.

The amount of income realized by a taxpayer upon receipt of a payment that qualifies for § 126 is equal to the value of the improvement less the sum of: (1) the excludable portion under § 126; and, (2) the taxpayer’s share of the cost of the improvement. In the terms of § 126, “payment” means payment of an economic benefit to the taxpayer upon receipt of an improvement.

Assuming all of the payments are primarily for the conservation purposes described above and no portion of the payment is for rent or compensation, the amount included in gross income hinges on the determination of the “excludable portion” of a payment.

“Excludable portion” means “the present fair market value of the right to receive annual income from the affected acreage of the greater of 10 percent of the prior average annual income from the affected acreage or $2.50 times the number of affected acres.” “Prior average annual income” means the average gross receipts from the affected acreage for the last three taxable years preceding the taxable year in which installation of the improvement began. The regulations provide examples of the application of these rules, which are beyond the scope of this article but are well worth reviewing.

Although § 126 is a potential boon, it is not without pitfalls. On a sale or other disposition of property acquired, improved, or otherwise modified by expenditures financed with the excluded § 126 payments, § 1255 requires recapture of these amounts on a sliding scale, subject to rules similar to those applicable to § 1245 depreciation recapture. Gain on the disposition is ordinary income up to the amount of the § 126 exclusion, over a twenty year time period reduced by 10% for every year in excess of ten years that the taxpayer held the property following receipt of the excluded amount. This trap for the unwary could put the taxpayer in a less favorable position than would have been obtained without § 126.

The decision to elect to utilize § 126 requires careful planning. However, with current designations of qualifying projects and future expansion opportunities to include additional water projects, § 126 should prove to be a very useful tool in this effort. The next and last article in this series will address some creative opportunities available through the use of conservation easements and certain exchange transactions.

About the authors: Dana M. Apfelbaum, Brad Gould, and Michael D. Minton each practice in Dean Mead’s Fort Pierce office located in St. Lucie County, Florida, and advise clients on tax, estate planning, general business, agribusiness, and water law issues.
FLORIDA’S WATER CRISES . . .
from previous page

(Endnotes)
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).
4 IRC §§ 126(d), 126(e).
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).

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 Department’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

continued, next page
STATUTES OF LIMITATIONS . . .

from previous page

to benefit from the full one year tolling period.

We turn now to the unresolved meaning of this “toll- ing” 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 “tolling,” 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 “tolling” 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.
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.


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 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.
Due Process Nexus Arguments Supported by Recent Florida Personal Jurisdiction Cases (Part 2)

By: Mark E. Holcomb
Dean Mead & Dunbar
Tallahassee, FL

This article concludes a two-part series examining the use of personal jurisdiction cases to analyze due process nexus issues for state tax purposes. Part 1 explored the development and application of federal due process principles in state tax cases. The 2012 Florida decision in Universal Music Venezuela, S.A. v. Montaner, 105 So. 3d 588 (Fla. 3rd DCA 2012) was used to illustrate the potential value of personal jurisdiction decisions in this context. This article focuses on the more recent Florida appellate court decision in Intego Software, LLC v. Concept Development, Inc., No. 1015-4082 (Fla. Dist. Ct. App. July 25, 2016) and how that case may further impact the due process analysis.

Intego Software involved a breach of contract claim arising out of the defendant’s agreement to engineer and construct a water-resistant, two-way communication nurse call device for hospital use. The defendant, a California-based company, secured the contract through numerous written communications (electronic mail, telefax and regular mail), by telephone, and through meetings between its representatives and the plaintiff in Florida. The contract required the defendant to provide both prototypes and marketable finished devices, as well as any notices under the contract, to the plaintiff in Florida. If the contract were terminated early, the defendant was required to deliver to the plaintiff in Florida all records, plans, tools and equipment related to the work performed. The plaintiff alleged that the devices were late and not marketable.

The defendant denied that it was doing business in Florida under both the long-arm jurisdiction statute and due process principles, and moved to dismiss the lawsuit. The defendant conceded that its representatives made two trips to Florida to meet with the plaintiff, but denied that it performed any services at those meetings. In support of its motion to dismiss, the defendant filed an affidavit asserting that the company “does not and has not”:

- owned any real property or tangible personal property in Florida;
- have an office or designated agent in Florida; have a Florida bank account;
- have a Florida property tax listing;
- registered to do business in Florida;
- have any employees in Florida;
- carry on any business in Florida;
- earned any income performing services in Florida;
- committed any tort in Florida;
- agreed to be subject to jurisdiction or venue in Florida; or
- breached any contract in Florida.

The trial court granted the defendant’s motion to dismiss, but a majority of the appellate court reversed. In a 2-1 decision, the majority determined that the defendant’s business activities as alleged in the Complaint were sufficient to show that the defendant was doing business in Florida. These activities included: ongoing, extensive communications with plaintiff in Florida; the defendant’s representatives traveled to Florida to meet with the plaintiff and procure the contract; the defendant sent deliverables to the plaintiff in Florida, as required by the contract; the contract required notices to be sent to plaintiff in Florida; and plaintiff demanded a refund of its payments, which would have been paid to plaintiff in Florida.

The majority found that these uncontroversial allegations satisfied both the long-arm jurisdiction statute and due process requirements. Similar allegations “appear fairly regularly in cases involving long-arm jurisdiction” and were held to be sufficient to support the exercise of jurisdiction. For example, the long-arm statute is satisfied when a non-resident defendant procures business in Florida, even if that business results from only sporadic attempts. Those sporadic attempts may include as little as one visit to Florida, coupled with sending “numerous” communications to Florida in connection with that business.

In the majority’s view, due process requirements were also satisfied. The majority held that “[t]his due process analysis asks whether the defendant’s conduct and connection with Florida are such that the defendant should reasonably anticipate being sued in Florida.” Based on the facts alleged, the majority concluded that the defendant should have reasonably anticipated being sued in Florida in the event of a legal dispute over its performance under the contract. The majority relied on prior cases where this due process standard was met, involving out-of-state defendants traveling to Florida, negotiating contracts in Florida, and directing written and oral communications to Florida plaintiffs.

The dissent disagreed, opining that “the assertion of personal jurisdiction here would violate Due Process by offending the ‘traditional notions of fair play and substan-
DUE PROCESS . . .

from previous page

tial justice.” Noting that conduct satisfying the long-arm statute does not automatically satisfy the due process requirement of minimum contacts, the dissent concluded that it was not fair or reasonable to require the defendant to defend the case in Florida. The dissent argued that Florida had no interest involved that would warrant adjudicating the dispute, other than a plaintiff doing business in this state, which was not a sufficient connection.

The majority opinion reaches the result one would expect if analogous facts were litigated under established due process tax nexus cases. The defendant engaged in three primary nexus-generating activities: traveling to Florida to meet with the plaintiff and negotiate the contract; directing numerous written and oral communications to the plaintiff in Florida; and sending both prototypes and finished devices to the plaintiff in Florida. Each of these activities falls within parameters established by the U.S. Supreme Court as sufficient to establish taxing jurisdiction under the Due Process Clause: the presence of sales personnel in the state justifies the exercise of jurisdiction because the seller's local activities are accorded the protection and services of the taxing state; mail and wire communications across state lines that are purposefully directed to residents of another state will suffice even absent physical presence in the taxing state; and the presence of more than an insignificant amount of the taxpayer's property in the state will satisfy due process concerns. When taken together, these activities would amply support the conclusion that a taxpayer under analogous circumstances had purposefully availed itself of the benefits of Florida's economic market.

The dissent's reliance on “traditional notions of fair play and substantial justice” – without amplification – provides no meaningful guidance. Whatever that phrase means – or may have meant in the 1940's when it was first articulated – the U.S. Supreme Court has more recently used “fair warning” as a proxy for the modern due process standard. It is difficult to see how the Intego Software defendant's multiple connections with Florida failed to provide fair warning that it might be subject to suit here.

In contrast with Intego Software, the more recent decision in Magwitch, LLC v. Pusser's West Indies Limited, No. 2D15-897 (Fla. Dist. Ct. App. Sept. 7, 2016) is not pertinent to the due process nexus analysis because the court held that the defendant did not have sufficient contacts with Florida under the long-arm jurisdiction statute, and did not reach the due process issue. While the defendant in that case did register to pay Florida sales tax on its Internet sales to Florida residents, the result is not incongruous: the Florida Internet sales were delivered by a Florida fulfillment house, resulting in a transfer of title to and possession of tangible property in Florida, which constitutes a taxable sale. The defendant's in-state sales (albeit taxable) were deemed to be de minimis, and so did not satisfy the long-arm jurisdiction statute.

Personal jurisdiction cases that may be helpful to analyzing due process nexus issues in state tax matters are plentiful. The cases mentioned here are just a few of the more recent Florida decisions that may be used to bolster existing due process tax cases.

About the author: Mark E. Holcomb of Dean Mead & Dunbar in Tallahassee, Florida, has practiced state and local tax law for over 30 years. He is a past Chair of the Florida Bar Tax Section and past recipient of the Gerald T. Hart Outstanding Tax Attorney of the Year award (2014-15).

(Endnotes)

1 105 So. 3d 588 (Fla. 3d DCA 2012) (holding that personal jurisdiction did not exist), reh. denied (Jan. 30, 2013).
2 __ So. 3d __, 2016 WL 3974994 (Fla. 1st DCA July 25, 2016).
3 Id. at *1.
4 Id.
5 Id.
6 Id.
7 Id.
8 Id.
9 Id. at *2.
10 Id. at *4-*5.
11 Id. at *4-*7. See generally, Venetian Salami Co. v. Parthenais, 554 So. 2d 489 (Fla. 1989).
12 Id. at *6.
13 Id.
14 Id. (citing cases).
15 Id. at *4 (citing World Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980)).
16 Id. at *7.
17 Id.
18 Id. at *14.
19 Id.
20 Id.
22 Id. at 308 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985)).
23 Id. at 302 and n.1; see also, id. at 315 n.8 (reaffirming Court's prior rejection of'slightest presence' standard of constitutional nexus) (citing Nat'l Geo. Soc. v. Calif. Bd. of Equalization, 430 U.S. 551, 556 (1977)).
24 See id. at 307.
26 Id. at 308 (quoting Shaffer v. Heitner, 433 U.S. 186, 218 (1977) (Stevens, J., concurring)).
27 __ So. 3d __, 2016 WL 4649484 (Fla. 2d DCA Sept. 7, 2016).
28 Id. at *2, 4.
29 Sections 212.02(15)(a) and 212.05(1)(a) (b), Fla. Stat.; compare, Department of Revenue v. Share Int'l, Inc., 676 So. 2d 1362 (Fla. 1996) (dealer's sales made while in Florida were subject to sales tax, but not its remote Internet sales to Florida residents, for which dealer lacked Commerce Clause nexus).
30 2016 WL 4649484 at *4.
On August 10, 2016, the U.S. Tax Court issued its opinion in Estate of George H. Bartell Jr. et al. v. Commissioner (147 T.C. 5). In Bartell, the Court held that the acquisition of one property, which was held by an exchange facilitator until the buyer was able to sell the property for which he was seeking nonrecognition treatment, constitutes a like-kind exchange pursuant to section 1031 of the Internal Revenue Code. The Tax Court reached its holding by rejecting the IRS’s argument that exchange facilitators need to acquire the traditional benefits and burdens of ownership of the property in order for the transaction to qualify for nonrecognition treatment pursuant to section 1031. The decision is noteworthy partially because the facts of the case do not comply with the time requirements of Rev. Proc. 2000-37, which sets out certain safe-harbors for like-kind exchanges.

In Bartell, Bartell Drug (“Bartell”) entered into an agreement to purchase property from a third party. In anticipation of structuring a like-kind exchange, Bartell assigned its rights in the purchase agreement to third-party exchange facilitator. The exchange facilitator purchased the property with nonrecourse financing that was personally guaranteed by Bartell. Bartell was simultaneously given a right to acquire the property from the exchange facilitator for a stated period and price. Bartell then managed the construction of a drugstore on the property using the proceeds from the financing and, upon substantial completion of the construction, leased the store from the exchange facilitator. Bartell later contracted to sell an existing property to a fourth party. Bartell next entered into an exchange agreement with an intermediary and assigned its rights under both the sale agreement and the earlier agreement with the exchange facilitator to that intermediary. The intermediary sold Bartell’s existing property and applied the proceeds of that sale to the acquisition of the newly acquired property. Title to the new property was then transferred to Bartell.

The IRS argued that Bartell owned the newly acquired property long before the property for which the seller sought the benefits of section 1031 was sold, thereby precluding a like-kind exchange. The IRS predicated its arguments on a benefits and burdens analysis, arguing that Bartell would be the party affected by any appreciation or depreciation in the property, was personally liable for the acquisition debt, that the facilitator had no economic interest in the property, and was in neither possession nor control over the property.

The Court rejected the IRS’ arguments and held that the exchange facilitator was properly treated as the owner of the newly acquired property throughout the time it held the property and that section 1031 exchange facilitators need not assume the traditional benefits and burdens of ownership.

While holding in Bartell is an encouraging ruling for taxpayers seeking to structure like-kind exchanges in a manner that will suit their business needs, the IRS has made its dissatisfaction with the Bartell ruling very clear and is considering an appeal.

About the author: Ruben Conitzer is the managing attorney of Ruben Conitzer, P.A. and serves as of-counsel to Galbut, Walters, & Associates, LLP. His legal practice focuses on real estate and corporate transactions and the federal income tax issues that affect them.

* * *
David Bowie, Prince, Whitney Houston, Michael Jackson. These are just a few examples of celebrity estates making the headlines. What they all have in common is the challenge of dealing with intangible assets that will generate income, such as royalties, long after death.

We might not be entertainment lawyers, but as estate planners we see more and more planning for royalty streams. Take for example the college professor who has authored a textbook. While Florida has long shown a preference for determining and honoring the decedent's intent, of course we as planners would prefer to get it right from the outset. Here are some tips for success:

1. Gather a Team. You will need intellectual property expertise and an agent (i.e. talent, literary, booking) on board. Develop a contract with the agent. Your client will obviously want a strong marketing program, but did you know that standard agent commissions run between 15-30%? And, that experts will tell you that the fee is even higher after death, because it is harder to market when there are no more live appearances?

2. Avoid Adverse Publicity. In the past years, Leimberg has run analysis of the estate plans of Frank Gifford, Robin Williams, and Michael Jackson. Take advantage of the privacy of trusts and keep estate planning documents out of the public eye.

3. Clearly Identify Beneficiaries. Prince died intestate. It appears his six half-siblings, after a court battle, will ultimately inherit and control the assets of an estate worth hundreds of millions of dollars. Needless to say, a basic will is better than nothing. When drafting, clearly identify beneficiaries. “I presently have a few grandchildren and may have more” is a lawsuit waiting to happen!

4. Use an Entity. Create a limited liability company or other entity to hold intellectual property and memorabilia, i.e. the tangible personal property (books, guitars, collectibles, etc.).

5. Review Florida’s Principal and Income Act. Section 738.603 of the Florida Statutes requires a fiduciary to “allocate to income 5 percent of the receipts” and the balance to principal. While leaving the intangibles to a limited liability company eliminates this problem, a trust that restricts a fiduciary to income only distributions without giving them the power to adjust principal and income may result in limited distributions and disgruntled heirs.

6. Plan for GST. Consider generation skipping transfer (“GST”) tax issues. Remember that a skip person
includes a non-family member who is more than 37.5 years younger than the decedent. A possibility given that your client may have a friend in this age category. Review your tax apportionment language. Maybe pay the tax out of non-intellectual property assets? Or allocate GST tax exemption to the skip person? On the other hand, maybe an heir is elderly and/or already wealthy. Use of a disclaimer may come to mind, but recall that the predeceased child rule is not invoked in the case of a disclaimer. Alternatively, perhaps you can take advantage of the previously taxed property credit.

About the authors:
John (“Jack”) C. Bovay is a shareholder at the law firm of Salter Feiber, P.A. in Gainesville, Florida. Mr. Bovay’s practice focuses on estate planning, business succession planning and fiduciary litigation.
Star M. Sansone is an associate at the law firm of Salter Feibler, P.A. in Gainesville, Florida. Ms. Sansone’s practice focuses on taxation, business and corporate issues and estate planning.

Endnotes:
1 See Fla. Stat. § 736.04117 (2016); In Re Estate of Murphy, 184 So.3d 1221 (Fla. 2d DCA 2016); Minassian v. Rachins, 152 So.3d 719 (Fla. 4th DCA 2014); Phipps v. Palm Beach Trust Co., 196 So. 299 (Fla. 1940).
3 26 U.S.C. § 2651(d).
Tax Section CLEs Available for Purchase

2016 Ullman Year in Review (Course No. 2392)

34th International Tax Conference (Course Nos. 1950 and 2095)

35th International Tax Conference (Course No. 2331)

Advanced Asset Protection (Course No. 2074)

Advanced Income Tax Planning for Family Business: The In’s, Out’s, and All About’s (Course No. 2329)

A Deep Dive Into Wealth Protection / Tax and Advanced Planning (Course No. 2053)

Essential Updates & Wealth Protection Building Blocks (Course No. 2211)

How to Be an Estate Planning Wizard (Course No. 1991)

Representing the Physician: The Only Constant is Change (Course No. 1829)

Tax Planning with Substance: A Multi-Area Survey of the Economic Substance Doctrine (Course No. 2056)