

STATE OF FLORIDA
DEPARTMENT OF REVENUE

IN RE:)
PETITION OF) CASE NO. 91-9DS
SUPERIOR INTERNATIONAL CORP.)

DECLARATORY STATEMENT

Petitioner seeks a Declaratory Statement concerning the applicability of Rule 12A-1.093 of the Florida Administrative Code as it relates to the facts described herein. The request for Declaratory Statement was filed December 9, 1991.

ISSUE

Whether a Taxpayer is entitled to rely on a Departmental Rule which sets forth a three (3) year statute of limitations period and a three (3) year books and records retention requirement, when the Departmental Rule is in conflict with amendments that had been made to the statute of limitations and books and records retention requirement found in the Florida Statutes which extended the applicable periods from three (3) years to five (5) years.

FACTS

The Petitioner has posed a factual situation where it had purchased during the most recent five (5) year period \$600 of goods. The purchases all occurred during the most recent three (3) years of the five (5) year period. The Petitioner retained records for only the three (3) most recent years, pursuant to the language in Rule 12A-1.093(2), F.A.C. The records reflected the \$600 of purchases. During an audit by the Department of Revenue (Department), the Department made an estimated assessment for the two (2) years

of the five (5) year period where no records were maintained by the Petitioner. The estimated assessment determined that the Petitioner had made \$400 of purchases during this (2) two year period. The Department, therefore, asserted that the Petitioner had made \$1,000 in purchases over the five (5) year period, while the Petitioner asserted that it actually only made \$600 of purchases, which were all reflected in the records that were maintained for the most recent three (3) year period.

ANALYSIS

Prior to July 1, 1987, the authority of the Department to audit and assess liability for sales and use tax was limited to a three (3) year period commencing on the first day of the month following the date on which the tax became due and payable. This statutory provision, Section 95.091(3), F.S. (1985), reads 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.

For the same period (prior to July 1, 1987), books and records that contained information concerning sales and use tax liability were required to be kept for a period of

three (3) years. This provision, Section 212.13(2) and (4), F.S. (1985), reads as follows:

(2) Each dealer, as defined in this chapter, shall secure, maintain, and keep for a period of 3 years a complete record of tangible personal property received, used, sold at retail, distributed or stored, leased or rented by said dealer, together with invoices, bills of lading, gross receipts from such sales, and other pertinent records and papers as may be required by the department for the reasonable administration of this chapter; and all such records which are located or maintained in this state shall be open for inspection by the department at all reasonable hours at such dealer's store, sales office, general office, warehouse, or place of business located in this state. Any dealer who maintains such books and records at a point outside this state must make such books and records available for inspection by the department where the general records are kept. Any dealer subject to the provisions of this chapter who violates these provisions is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

(4) For the further purpose of enforcement of this chapter, every wholesaler of tangible personal property licensed within this state is required to permit the department to examine his books and records at all reasonable hours. He must also maintain such books and records for a period of not less than 3 years in order to disclose the sales of all goods sold, and to whom sold, and also the amount of items sold, in such form and in such manner as the department may reasonably require, and so as to permit the department to determine the volume of goods sold by wholesalers to dealers, as defined under this chapter, and the dates and amounts of sales made. The department may require any manufacturer or wholesaler who refuses to keep such inspection through the circuit courts of Florida to submit to such inspection, subject however to the right of removal of the cause as hereinbefore provided in this section.

In Chapter 87-6, Laws of Florida, as amended by Chapter 87-101, Laws of Florida, the authority of the Department to audit and assess liability for sales and use tax was extended from three (3) years to five (5) years (presuming

circumstances were not present that would justify use of a longer limitations period) after the later of the date the tax is due, any return is due, or any return is filed. The relevant statutory provision, Section 95.091(3), F.S. (1987), effective July 1, 1987, reads as follows:

(a) With the exception of taxes levied under chapter 198 and tax adjustments made pursuant to s. 220.23, the Department of Revenue may determine and assess the amount of any tax, penalty, or interest due under any tax enumerated in s. 72.011:

1. Within 5 years after the date the tax is due, any return with respect to the tax is due, or such return is filed, whichever occurs later;

2. Within 6 years after the date a taxpayer either makes a substantial underpayment of tax or files a substantially incorrect return;

3. At any time while the right to a refund or credit of the tax is available to the taxpayer;

4. At any time after the taxpayer has fraudulently failed to make any payment of the tax, has fraudulently failed to file a required return, or has filed a grossly false or fraudulent return; or

5. In any case in which there has been an erroneous refund of tax, within 5 years after making such refund, or at any time after making such refund if it appears that any part of the refund was induced by fraud or the misrepresentation of a material fact.

(b) The limitations in this subsection shall be tolled for a period of 2 years if the Department of Revenue has issued a notice of intent to conduct an audit or investigation of the taxpayer's account within the applicable period of time as specified in this subsection.

The requirement for keeping books and records contained in Section 212.13(2) and (4), F.S. (1987), was not simultaneously extended to mirror the five (5) year period in the limitations statute, but instead was left at a three (3)

year period.

In Chapter 88-119, Laws of Florida, Section 95.091(3), F.S., was amended, applicable to taxes which remained open for assessment as of July 1, 1988, to read as follows:

(a)1. With the exception of taxes levied under chapter 198 and tax adjustments made pursuant to s. 220.23, the Department of Revenue may determine and assess the amount of any tax, penalty, or interest due under any tax enumerated in s. 72.011:

a. Within 5 years after the date the tax is due, any return with respect to the tax is due, or such return is filed, whichever occurs later;

b. Within 6 years after the date the taxpayer either makes a substantial underpayment of tax, or files a substantially incorrect return;

c. At any time while the right to a refund or credit of the tax is available to the taxpayer;

d. At any time after the taxpayer has failed to make any required payment of the tax, has failed to file a required return, or has filed a grossly false or fraudulent return; or

e. In any case in which there has been a refund of tax erroneously made for any reason, within 5 years after making such refund, or at any time after making such refund if it appears that any part of the refund was induced by fraud or the misrepresentation of a material fact.

2. For the purpose of this paragraph, a tax return filed before the last day prescribed by law, including any extension thereof, shall be deemed to have been filed on such last day, and payments made prior to the last day prescribed by law shall be deemed to have been paid on such last day.

(b) The limitations in this subsection shall be tolled for a period of 2 years if the Department of Revenue has issued a notice of intent to conduct an audit or investigation of the taxpayer's account within the applicable period of time as specified in this subsection.

Chapter 88-119, Laws of Florida, also contained provisions that brought books and records retention

requirements into conformity with the Department's audit and assessment ability. The relevant provisions created a standard requirement that taxpayers retain books and records pertinent to their tax liabilities for the same period as the tax may be determined and assessed. These provisions, which were effective July 1, 1988, are as follows:

212.13 Records required to be kept; power to inspect; audit procedure.-

(2) Each dealer, as defined in this chapter, shall secure, maintain, and keep as long as required by s. 213.35 a complete record of tangible personal property or services received, used, sold at retail, distributed or stored, leased or rented by said dealer, together with invoices, bills of lading, gross receipts from such sales and other pertinent records and papers as may be required by the department for the reasonable administration of this chapter; all such records which are located or maintained in this state shall be open for inspection by the department at all reasonable hours at such dealer's store, sales office, general office, warehouse, or place of business located in this state. Any dealer who maintains such books and records at a point outside this state must make such books and records available for inspection by the department where the general records are kept. Any dealer subject to the provisions of this chapter who violates these provisions is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(4) For the further purpose of enforcement of this chapter, every wholesaler of tangible personal property or services licensed within this state is required to permit the department to examine his books and records at all reasonable hours. He must also maintain such books and records as long as required by s. 213.35 in order to disclose the sales of all goods or services sold, to whom sold, and also the amount of items sold, in such form and in such manner as the department may reasonably require, so as to permit the department to determine the volume of goods or services sold by wholesalers to dealers, as defined under this chapter, and the dates and amounts of sales made. The department may require any manufacturer or wholesaler who refuses to keep such records or to permit such inspection, through the circuit courts of Florida, to submit to such

inspection, subject however to the right of removal of the cause as hereinbefore provided in this section.

213.35 Books and records.-Each person required by law to perform any act in the administration of any tax enumerated in s. 72.011 shall keep suitable books and records relating to that tax, such as invoices, bills of lading, and other pertinent records and papers, and shall preserve such books and records until expiration of the time within which the department may make an assessment with respect to that tax pursuant to s. 95.091(3).

A Departmental rule, Rule 12A-1.093, F.A.C., specified a three (3) year limitations period, along with a three (3) year books and records retention requirement. This rule, in its relevant parts, read:

(2) Each dealer defined in Chapter 212, F.S., each licensed wholesaler, and any other person subject to the tax imposed by Chapter 212, F.S., shall keep and preserve, for a period of three years, a complete record of all transactions, together with invoices, bills of lading, gross receipts from sales, resales certificates, consumer exemption certificates and other pertinent records and paper as may be required by the Department of Revenue for the reasonable administration of Chapter 212, F.S., and such books of account as may be necessary to determine the amount of tax due thereunder. All such books, invoices and other records shall be open for inspection by the Department of Revenue at all reasonable hours at the dealer's store, sales office, warehouse or place of business located in this state. Any dealer who maintains such books and records at a point outside this state shall make such books and records available for inspection by the Department of Revenue where the general records are kept.

(3) The amount of any tax imposed under Chapter 212, F.S., may be determined and assessed for a period of three years after the tax becomes due and payable. The beginning of the three-year period for determination and assessment of tax due shall be three years prior to the first day of the month in which a request for inspection and examination of the books and records has been made by the Department. The dealer shall have 60 days from the date of the Notice of Intent to audit books and records for Florida Taxes to have available for inspection all such books and records, including resale

and exemption certificates. The Department is not required to issue a Notice of Intent to audit in situations involving emergency audits requested by taxpayers, or in distress or jeopardy situations referred to in s. 212.14 or s. 212.15.

This rule, however, was not amended until December 16, 1991, when it was changed to read, in relevant parts, as follows:

(2) Each dealer defined in Chapter 212, F.S., each licensed wholesaler, and any other person subject to the tax imposed by Chapter 212, F.S., shall keep and preserve a complete record of all transactions, together with invoices, bills of lading, gross receipts from sales, RESALE CERTIFICATES, CONSUMER EXEMPTION CERTIFICATES and other pertinent records and papers as may be required by the Department of Revenue for the reasonable administration of Chapter 212, F.S., and such books of account as may be necessary to determine the amount of tax due thereunder.

(3) All such books, invoices and other records shall be open for inspection by the Department of Revenue at all reasonable hours at the dealer's store, sales office, warehouse or place of business located in this state. Any dealer who maintains such books and records at a point outside this state shall make such books and records available for inspection by the Department of Revenue where the general records are regularly kept.

(4) For transactions for which a return was required and tax paid before July 1, 1985, books and records required to be kept shall be retained for three years from the first day of the month following the date on which the tax on the transaction became due and payable, or until the end of June 30, 1988, whichever is earlier.

(5) For transactions for which a return was required and tax paid on or after July 1, 1985, books and records shall be retained until tax imposed by Chapter 212, F.S., may no longer be determined and assessed under s. 95.091(3), F.S.

(6) The consequences of failure or refusal to keep and retain books and records, or to make them accessible, can be any or all of the following:

(a) Conviction of a misdemeanor under s. 212.12(2), F.S.;

(b) Assessment of tax based on an estimate by the department, based upon the best information or evidence available, of the maximum amount of tax that should have been reported and remitted by the dealer; or

(c) Loss of collection allowance, as authorized by s., 212.12(1), F.S.

(7)(a) Unless a Notification of Intent to Audit Books and Records is issued, the amount of any tax imposed under Chapter 212, F.S., may be determined and assessed for any of the following periods of time:

1. For a transaction on which a return was required and tax paid before July 1, 1985, a period of three years after the first day of the month following the date on which the tax on the transaction became due and payable.

2. For a transaction on which a return was required and tax paid on or after July 1, 1985:

a. Within 5 years after the date the tax is due, any return with respect to the tax is due, or the return is filed, whichever occurs later;

b. Within 6 years after the date the taxpayer either makes a substantial underpayment of tax, or files a substantially incorrect return;

c. At any time while the right to a refund or credit of the tax is available to the taxpayer;

d. At any time after the taxpayer has failed to make any required payment of the tax or has failed to file a required return, whether or not such failure was fraudulent;

e. At any time after the taxpayer has filed a grossly false or fraudulent return; or

f. Within five years after a refund of tax has been erroneously made for any reason, or at any time after making a refund of tax if it appears that any part of the refund was induced by fraud or the misrepresentation of material fact.

3. Any date later than the date specified in subparagraphs 1. and 2., which is agreed upon by

the Department and the taxpayer under Rule 12-16, F.A.C.

(b) For the purpose of this subsection, a tax return filed before the last day prescribed by law, including any extension thereof, shall be deemed to have been filed on such last day and payments made prior to the last day prescribed by law shall be deemed to have been paid on such last day.

(c) Any person who, before January 1, 1988, was required by s. 212.13, F.S., to keep records relating to the sale or use of services which first became taxable effective July 1, 1986 (laundry, dry cleaning, valet, carpet and upholstery cleaning), and other services which first became taxable effective July 1, 1987, is subject to the same record keeping, time for making assessment, and other requirements as stated above, even though the tax was repealed effective January 1, 1988.

(d) For purposes of sub-subparagraph (7)(a)2.b. a payment of tax will be considered a substantial underpayment if the taxpayer has omitted from a return an amount properly includable which is in excess of 25 percent of the tax due as shown by the return; and a return will be considered substantially incorrect if it contains errors, misstatements, or inaccuracies that result in payment of a tax that is less than 75 percent of the amount due.

As the foregoing discussion has pointed out, there was present a conflict between provisions in the Florida Statutes and the Department's rules concerning the applicable statute of limitations and books and records retention requirements. Where there is a conflict between a statute and a rule, the terms of the statute are controlling. Nicholas v. Wainwright, 152 So.2d 458, 460 (Fla. 1963), and Canal Insurance Co. v. Continental Casualty Co., 489 So.2d 136, 138 (Fla. 2d DCA 1986). A rule can not enlarge, modify, or contravene the provisions of a statute. Dep't of Business Regulation v. Salvation Ltd., Inc., 452 So.2d 65, 66 (Fla. 1st DCA 1984), and Seitz v. Duval County School Board, 366

So.2d 119, 121 (Fla. 1st DCA 1979), cert. denied, 375 So.2d 911 (Fla. 1979). If a rule contravenes a statute, the rule must be rejected as an invalid exercise of delegated legislative authority. Dep't of Natural Resources v. Wingfield Development Co., 581 So.2d 193, 198 (Fla. 1st DCA 1991).

If a party seeks to invoke estoppel against the state due to reliance upon information provided by or statements made by the state or a state officer, there must be shown: 1) a representation by the party estopped to the party claiming estoppel as to some material fact; 2) a reliance upon the representation by the party claiming the estoppel; and 3) a change in such party's position caused by his reliance upon the representation to his detriment. Dep't of Revenue v. Anderson, 403 So.2d 397, 400 (Fla. 1981) and Dep't of Revenue v. Hobbs, 368 So.2d 367, 369 n.4 (Fla. 1st DCA 1979), appeal dismissed, 378 So.2d 345 (Fla. 1979). Estoppel against the state must be based upon exceptional or special circumstances. Anderson, 403 So.2d at 400, and Long v. Dep't of Administration, 428 So.2d 688, 693 (Fla. 1st DCA 1983). Estoppel against the state requires a positive act on the part of a state officer. Dep't of Revenue v. Air Jamaica, Ltd., 522 So.2d 446, 449 n.3 (Fla. 1st DCA 1988). The state can not be estopped through mistaken statements of the law. Anderson, 403 So.2d at 400, Long, 428 So.2d at 693, Hobbs, 368 So.2d at 369, and Austin v. Austin, 350 So.2d 102, 105 (Fla. 1st DCA 1977), cert. denied, 357 So.2d 184 (Fla. 1978).

ANSWER

Where there is a conflict between a statute and a rule, the

statute and its terms control and are what must be followed. The 1987 amendments to Sections 95.091, 212.13, and 212.35, F.S., superseded the Department's former Rule 12A-1.093, F.A.C., and the amendments must be given effect as of the date of their enactment, rather than on the date that the Department amended portions of its rule to conform to the statutory amendments. Books and records are required to be kept for a five (5) year period, the period required by Sections 95.091(3), 212.13(2) and (4), and 213.35, F.S., rather than the three (3) year period previously specified in Rule 12A-1.093, F.A.C. Petitioner, therefore, was required to have kept its books and records for a period of five (5) years. Similarly, the Department has the authority to audit and assess liability for tax for a five (5) year period (assuming circumstances are not present which would justify use of a longer limitations period), the period specified in Section 95.091(3), F.S., rather than the three (3) year period previously specified in Rule 12A-1.093, F.A.C. The Department, therefore, could audit and assess liability for sales and use tax for a period of five (5) years.

Petitioner has not shown special or exceptional circumstances that would cause estoppel to be invoked against the Department. All Petitioner has shown is that there was a mistaken statement of the law, which does not estop the state. Accordingly, the Department can not be estopped from requiring Petitioner to have kept books and records for a five (5) year period, the period required by Sections 95.091(3), 212.13(2) and (4), and 213.35, F.S., instead of the three (3) year period previously found in

Rule 12A-1.093, F.A.C. Additionally, the Department can not be estopped from auditing and assessing sales and use tax liability for a five (5) year period, the period required by Section 95.091(3), F.S., instead of the three (3) year period previously found in Rule 12A-1.093, F.A.C.

IT IS THEREFORE SO ORDERED.

Any party to this Declaratory Statement has the right to seek judicial review of the Declaratory Statement as provided in Section 120.68, F.S., by filing a Notice of Appeal as provided in Rule 9.110, Florida Rules of Appellate Procedure, with the Clerk of the Department in the Office of General Counsel, Post Office Box 6668, Tallahassee, Florida 32314-6668, and by filing a copy with the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within thirty (30) days from the date this Declaratory Statement is filed with the Clerk of the Department.


DONE AND ORDERED this 16th day of January, 1992.

STATE OF FLORIDA
DEPARTMENT OF REVENUE



J. THOMAS HERNDON
Executive Director

Filed with the Agency Clerk and served on the parties this 16th day of January, 1992.


Agency Clerk

