



Florida Department of Revenue
Office of General Counsel

Jim Zingale
Executive Director

5050 West Tennessee Street, Tallahassee, FL 32399

floridarevenue.com

November 4, 2022

Via Electronic Delivery

French Brown, Esq.
Dean, Mead & Dunbar
106 East College Avenue
Suite 1200
Tallahassee, FL 32301
Email: fbrown@deanmead.com

RE: Written Comment Submitted September 27, 2022 on the Proposed Development
Amending Rule 12-6.001, Florida Administrative Code

Dear Mr. Brown:

As outlined in your written comment submitted September 27, 2022, the Department of Revenue is promulgating revisions to Fla. R. Admin. Code 12-6.001(2)(b) (“proposed rule”). The revisions clarify that notices are issued when created and dated, and provide that the Department may send notices electronically with the affirmative consent of a taxpayer. As set out in various existing rules, the date of the issuance of a notice triggers the running of time for a substantially affected person to protest the notice.

In the three months since the notice of rule development was first filed on July 12, 2022, the Department has received no additional comments aside from your submission. Submitted on September 27, 2022, the comment is directed to the proposed rule’s clarification that a notice is issued when it is created and dated. The comment contends that defining the date of issuance as when a notice is created and dated can violate the due process rights of interested parties.

The Department believes the comment is unfounded. The comment (1) ignores *existing* rules and notice provisions that already tie the time to initiate a protest to the date on the notice; (2) overlooks the requirement under the rule that notices issued by the Department be “**sent**” and the plain meaning of the “date of issuance” of a notice as confirmed by an administrative law judge; and (3) misstates the due process implications of providing notices to taxpayers. The comment suggests an alternative that would conflict with existing rules, dramatically alter the Department’s current practice, and lead to confusion for taxpayers about their protest rights.

The Comment Misstates the Current Law

The proposed rule’s provision that a notice is issued when it is created and dated is consistent with the Department’s current practice and numerous *existing rules already in effect* that provide that notices become “final for purposes of chapter 72, F.S., upon the expiration of [a discrete number

of] consecutive calendar days ... after *the date of issuance on the [notice]*.” See Fla. Admin Code R. 12-6.003(1)(c) (addressing the finality of assessments); Fla. Admin Code R. 12-6.0032(1)(c) (addressing the finality of notices of proposed refund denials) (emphasis added).¹ The rule also requires that notices issued by the Department pursuant to the rule be “**sent**.” The comment incorrectly suggests that the clarification of the rule could only “operate in the Department’s favor by shortening the amount of time a taxpayer has to respond to a Notice” because the proposed rule *does not change* the time that taxpayers have to challenge assessments or refund denials. Those timeframes are already calculated from “from the date of issuance on the [assessments or refund denials].”

The proposed rule’s clarification is consistent with the holding of an administrative law judge that interpreted the plain meaning of “date of issuance” of an assessment to mean the date that was identified on the assessment. *WKDR II, Inc., v. Dep’t of Revenue*, Case No. 21-0844 (DOAH Nov. 30, 2021) at ¶ 94 (the “most reasonable interpretation of the ‘date of issuance on the assessment’ ... is the date listed at the top of the [notice]”).

The comment’s “procedural process” concerns about the proposed rule are also unfounded. While the comment correctly notes that “there is no single test used by courts to determine whether Due Processes (*sic*) requirements have been met,” the comment does not identify how the *proposed rule* could threaten taxpayers’ due process rights. The only concrete example presented—of the Department engaging in an “unintentional or intentional delay in the service of a notice” to ostensibly cut off a taxpayer’s protest rights “without [the taxpayer] ever being aware that a Notice was “issued”—does not address a deficiency with the proposed rule. Rather, the example proposes a clearly improper practice that would violate a taxpayer’s due process rights, regardless of whether or not the proposed rule were in effect. Nothing in the proposed rule attempts to—or could—cut off a taxpayer’s constitutionally protected entitlement to notice of any attempt by the Department to take a final agency action that implicates the taxpayer’s protected interests.

The Comment Suggests an Unworkable Alternative

As an alternative rule, the comment suggests that the Department upend its long-established practice and adopt a provision stating that a “notice is issued when the notice is created, dated, and mailed.”² This alternative is unworkable. It conflicts with existing rules that provide that a taxpayer’s time to protest a notice starts to run when from the “*date of issuance on the [notice]*.” The alternative’s reference to “mailing” also conflicts with the Department’s statutory authority to send notices to taxpayers by electronic means with affirmative consent. Finally, the term “mailing”

¹ The Department’s practice is not unique. The I.R.S. provides that a notice of intent to levy, a letter of adjustments to a tax return, or a deficiency can be protested “within 30 days from the date of the letter.” See <https://www.irs.gov/appeals/letters-and-notices-offering-an-appeal-opportunity>.

² The comment’s proposal is styled as a “lower cost regulatory alternative”. However, it does not address the regulatory costs of the Department’s proposed rule and is not a proposal for a lower cost regulatory alternative as specified in section 120.541(1)(a), Florida Statutes. The proposed rule does not affect any regulatory costs because it is consistent with existing rules, existing practice, and judicial interpretations of the phrase “date of issuance.” Nor does anything in the comment address the regulatory costs of the proposed alternative to indicate it could be a “lower cost”. Finally, if the proposed alternative was meant to be a “lower cost regulatory alternative,” it was submitted more than 21 days after publication of the notice and is untimely under section 120.54(3)(a), Florida Statutes.

is undefined. As a result, the proposed alternative is vague and would not give a taxpayer effective notice of when a protest is actually due, because while the Department might know in some cases when a notice was mailed, a taxpayer would have no way of knowing that information from looking at the notice. The alternative proposal could therefore mislead taxpayers into inadvertently missing their protest periods.

Sincerely,

A handwritten signature in blue ink, appearing to read 'M. S. Hamilton', with a stylized flourish at the end.

Mark S. Hamilton
General Counsel

Enclosure: *WKDR II, Inc., v. Dep't of Revenue*, Case No. 21-0844 (DOAH Nov. 30, 2021)

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

WKDR II, INC.,

Petitioner,

vs.

Case Nos. 21-0844
21-0845

DEPARTMENT OF REVENUE,

Respondent.

RECOMMENDED ORDER

The final hearing in this matter was conducted by Zoom Conference before Administrative Law Judge Jodi-Ann V. Livingstone of the Division of Administrative Hearings (DOAH), on August 18, 2021.

APPEARANCES

For Petitioner: Michael J. Bowen, Esquire
Akerman LLP
50 North Laura Street, Suite 3100
Jacksonville, Florida 32202

For Respondent: J. Clifton Cox, Esquire
John G. Savoca, Esquire
Office of the Attorney General
Revenue Litigation Bureau
The Capitol, Plaza Level 01
Tallahassee, Florida 32399

STATEMENT OF THE ISSUES

Whether WKDR II, Inc. (WKDR), is jurisdictionally time-barred from bringing the challenges in Case Nos. 21-0844 and 21-0845 to contest the Department of Revenue's (Department) tax assessment and subsequent freeze of WKDR's bank account to attempt to collect on the assessment.

PRELIMINARY STATEMENT

On February 19, 2021, WKDR filed a Petition for Chapter 120 Hearing to contest the Department's Notice of Proposed Assessment (NOPA), dated January 13, 2020, which assessed sales and use tax, a penalty, and interest against WKDR following an audit. A few days later, on February 23, 2021, WKDR filed a separate Petition for Chapter 120 Hearing to contest the Department's Notice of Intent to Levy (NIL), dated February 18, 2021, which gave notice that the Department was proceeding to freeze WKDR's bank account to collect the underlying audit assessment. The Department referred both petitions to DOAH on March 3, 2021, for the assignment of an administrative law judge to conduct chapter 120 hearings.

At DOAH, WKDR's challenge to the NOPA was designated Case No. 21-0845 and the challenge to the NIL was designated Case No. 21-0844, and they were both assigned to the undersigned. Both cases are "substantial interests" proceedings brought under sections 120.569 and 120.57(1), Florida Statutes.

On March 12, 2021, the Department filed a Motion to Consolidate Cases and to Bifurcate Issues. The undersigned granted the motion, in part, and consolidated the two above-styled cases for a hearing on the NOPA and the NIL.

On May 5, 2021, WKDR filed a Petition to Determine the Invalidity of Existing Administrative Rule 12-6.003. The rule challenge, filed pursuant to section 120.56(3), was designated Case No. 21-1488RX, and assigned to the undersigned.

On May 12, 2021, the Department filed the Department of Revenue's Agreed Motion to Consolidate Cases, Agreed Motion for Continuance, and

Unagreed Motion to Bifurcate Issues. The undersigned granted the motion. With this, WKDR's rule challenge was consolidated with the already consolidated challenges to the NOPA and NIL, and the proceeding was bifurcated for a hearing on the threshold jurisdictional issues prior to a final hearing on the merits. For the challenges to the NOPA and NIL, the threshold jurisdictional issue raised by the Department was timeliness; for the rule challenge, the threshold jurisdictional issue raised by the Department was WKDR's standing.

Prior to the hearing, the parties filed an Amended Joint Pre-Hearing Stipulation for August 18, 2021 Hearing on Jurisdictional Issues in which they stipulated to a number of facts. The agreed facts are incorporated in the findings below, to the extent relevant.

The hearing on the threshold issues was held on August 18, 2021, with both parties present and appearing from different locations in Florida via Zoom Conference. WKDR presented the testimony of Mark Smith, CPA. Respondent presented the testimony of Lisa Weems (Ms. Weems), a Revenue Specialist III employed by the Department. The Department's Exhibits 1, 2, 5, 7 through 14, 16 through 22, 25, 27 through 33, and 44 through 46 were admitted into evidence. In addition, portions of the depositions of Douglas Plattner and Jeffrey Barnard were admitted.

At the close of the hearing, the parties requested an extended deadline of 30 days following DOAH's receipt of the hearing transcript to file post-hearing submittals.¹ A two-volume Transcript of the final hearing was filed with DOAH; Volume I was filed on September 14, 2021, and Volume II was

¹ By agreeing to an extended deadline for post-hearing submissions beyond ten days after the filing of the transcript, the parties waived the 30-day timeframe for issuance of the Recommended Order. *See* Fla. Admin. Code R. 28-106.216.

filed on September 15, 2021. The parties timely filed post-hearing submittals. The submittals were duly considered in preparing this Recommended Order.

The undersigned enters this Recommended Order in the above-styled substantial interest proceedings because the determination on the threshold issues is dispositive of these two cases. Pursuant to an Order Severing Cases, issued November 30, 2021, Case No. 21-1488RX has been severed from these consolidated cases, and a separate order will be entered on the issue of standing.

All references to the Florida Statutes and the Florida Administrative Code are to the 2020 versions.

FINDINGS OF FACT

1. The Department administers Florida's sales tax statutes and performs audits to ensure compliance with sales tax laws.

2. WKDR is a Ford franchise car dealership operating as LaBelle Ford. WKDR is organized as an "S" corporation and is wholly owned by Douglas Plattner (Mr. Plattner).

3. WKDR's address is 851 South Main Street, LaBelle, Florida 33935 (851 South Main Street).

4. Mark Smith (Mr. Smith) is a self-employed certified public accountant (CPA) at the firm of Smith and Waggoner CPAs. He is the CPA for Mr. Plattner and WKDR.

5. Mr. Smith's business mailing address is 115 Tamiami Trail North, Suite 7, Nokomis, Florida 34275 (115 Tamiami Trail).

6. On or about March 21, 2019, the Department began a sales tax audit of WKDR for the period of March 1, 2016, through February 28, 2019 (audit period). WKDR was notified of the audit through a Notice of Intent to Audit Books and Records, dated March 21, 2019.

7. Jeff Barnard (Mr. Barnard) was a tax auditor for the Department. Mr. Barnard was responsible for examining the books and records of various taxpayers for compliance with Florida tax laws.

8. Mr. Barnard retired from the Department in May 2021. He was employed by the Department for 30 years. He spent the last 15 years with the Department as a Tax Auditor IV—the most senior tax auditor position at the Department.

9. Mr. Barnard was responsible for the tax audit of WKDR for the audit period.

10. On or about July 30, 2019, Mr. Smith sent the Department a fully executed Power of Attorney/Declaration of Representative form (POA form) to appear as WKDR's representative in connection with the Department's audit.

11. The POA form was completed and signed by WKDR's owner (Mr. Plattner) and its CPA (Mr. Smith). The POA form gave Mr. Smith authority to speak and act on WKDR's behalf for the Department's audit.

12. The POA form correctly states the mailing addresses of both WKDR and its CPA/representative, Mr. Smith. It also correctly states the e-mail address and fax number for Mr. Smith.

13. Mr. Smith entered WKDR's address in section 1 of the POA form. The POA form included spaces for a contact person's name, telephone number, and fax number at WKDR, but those spaces were left blank in the form signed by Mr. Smith and Mr. Plattner.

14. The POA form signed by both Mr. Smith and Mr. Plattner set forth the name, address, telephone number, and fax number of Mr. Smith's CPA firm in section 2 of the POA form.

15. Section 6 of the POA form provides as follows:

Notices and Communication. Do not complete Section 6 if completing Section 4.

Notices and other written communications will be sent to the first representative listed in Part I,

Section 2, unless the taxpayer selects one of the options below. Receipt by either the representative or the taxpayer will be considered receipt by both.

a. If you want notices and communications sent to both you and your representative, check this box.

b. If you want notices or communications sent to you and not your representative, check this box.

16. Mr. Smith completed section 6 by checking option "a," indicating that they wished to have notices and communication sent to both the taxpayer (WKDR) and the representative (Mr. Smith).

17. Mr. Smith's e-mail address was added on the POA form by the Department's employee, Lisa Weems, after she called Mr. Smith's telephone number to obtain his e-mail address. All other information was added by Mr. Smith after consultation with Mr. Plattner, before they both signed the form.

18. Throughout the audit, the Department's auditor, Mr. Barnard, primarily communicated with WKDR through its designated representative—Mr. Smith—at his mailing address and e-mail address. This included multiple requests for documents. At times, Mr. Barnard communicated directly with Mr. Plattner while copying Mr. Smith on the correspondence.

19. Mr. Barnard sent a letter dated November 14, 2019, by regular mail, to WKDR at 851 South Main Street, with a copy to Mr. Smith at 115 Tamiami Trail. Mr. Smith testified that he received and read this letter.

20. The November 14 letter provided WKDR and Mr. Smith with notice that, as things stood on that date, a NOPA was imminent. The letter stated, in pertinent part:

On September 20th, we wrote you a letter requesting the information needed to complete the audit of WKDR II Inc. and the DR54 Formal Notice of Demand to Produce Certain Records. The letter

stated that your failure to provide the information be [sic] September 27, 2019 may result in an assessment. That is, the implementation of alternative audit procedures to estimate a liability based on the best available information.

As of the date of this letter you have not complied with our request. Therefore, enclosed is the Notice of Intent to Make Audit Changes (DR1215) and the audit work papers, which are an estimate based upon the best information available as provided in Section 212.12(5)(b), Florida Statutes. **You have 30 days to review the audit adjustments, which expires on December 16, 2019.**

* * *

If we do not hear from you by **December 16, 2019**, the audit file will be sent to Tallahassee so that the Notice of Proposed Assessment (NOPA) can be issued to you. The NOPA is the formal notice of the amount due. The NOPA will also provide the procedures for filing informal and formal protests.

21. The Notice of Intent to Make Audit Changes, which was included with the November 14 letter, listed a "balance due through 11/14/2019" of \$1,157,025.16. This sum included taxes of \$801,967.01, a penalty of \$200,491.75, and interest of \$154,566.40. The notice also explicitly laid out WKDR's opportunities to informally protest this preliminary sum through a conference with the auditor or the auditor's supervisor. It provided that after the 30-day informal conference period expired, a NOPA would be issued.

22. On December 20, 2019, Mr. Barnard sent an e-mail to Mr. Plattner with a copy to Mr. Smith. Attached to the e-mail was a letter of the same date. The letter provided as follows:

On November 14, 2019, a Notice of Intent to Make Tax Audit Changes (DR-1215) was issued with additional tax due of \$801,967.00. The 30 day informal protest period with the Service Center was

up December 13, 2019.^[2] Although your representative, Mark Smith, did provide some sales invoices after issuance of the DR-1215 they did not represent a full month of invoices as requested.

Please be advised all sales invoices for December 2018 must be provided by January 3, 2020 for any changes in the assessment to be considered. These invoices should consist of same for all new and used vehicle sales, parts sales, service invoices/tickets, and autobody invoices for December 2018.

23. As indicated in the December 20 letter, one month before the NOPA was issued, Mr. Barnard notified Mr. Smith and Mr. Plattner that the 30-day informal protest period expired on December 13, 2019.

24. Mr. Smith's testimony on this matter was evasive. At first, he acknowledged that he received the December 20 letter. However, after objection from WKDR's counsel, Mr. Smith backtracked and denied receipt. His attempted denial was not credible and is not credited.

25. The undersigned finds that Mr. Smith received the December 20 letter.

26. Mr. Barnard sent another letter, dated January 7, 2020, by regular mail to Mr. Plattner, and by e-mail to both Mr. Plattner and Mr. Smith, which stated as follows:

Please be advised the information necessary to make an adjustment to the audit results issued on November 14, 2019 has not been provided.

As stated in our December 20, 2019 letter this information was sales invoices for all new and used vehicle sales, parts sales, service invoices/tickets, and autobody invoices for the entire month of December 2018.

² The Notice of Intent to Make Tax Audit Changes sent on November 14 provided a deadline of December 13 for the 30-day informal conference period, while the e-mail sent on December 20 referenced a deadline of December 16. The discrepancy in the December 20 letter is immaterial as both deadlines (December 13 and 16) had passed by the date of the December 20 letter.

The audit will be closed and a Notice of Proposed Assessment will be issued shortly.

27. Once again, Mr. Smith's testimony was evasive. After seemingly admitting he received and read the January 7 letter, Mr. Smith testified that he did not receive the January 7 letter. The undersigned found Mr. Smith's testimony on this point wholly untruthful.

28. At the hearing, during cross-examination, the Department's counsel asked Mr. Smith about his actions and impressions after receipt of the January 7 letter in the following exchange:

Q. Let's go to Exhibit 22, which is Bates Number 00081. This is another e-mail sent to you on January 7th, 2020 to Mr. Plattner showing a carbon copy to Mr. Mark Smith CPA POA. The third sentence states; "The audit will be closed and a notice of proposed assessment will be issued shortly." Does that mean that the audit is still open or the audit is closed?

A. That, like I said, I mean, I've -- I've dealt with audits where they say they're going to do this and do that and it's taken them two years to send anything.

Q. This letter dated January 7th, 2020 does not give a new deadline, does it?

A. It does not appear to but -- yeah, it does not appear to.

Q. In fact, it says the audit is closed. That means that it's done, right?

A. No. I don't -- I -- not necessarily.

Q. It also says that the notice of proposed assessment will be issued shortly. So you knew at this time, the NOPA was imminent, right?

A. Not necessarily.

Q. Is there any language in this letter indicating that WKDR has any more time to provide additional documents?

A. I've worked with the State before and they've provided us additional time quite often.

Q. In fact, the auditor did provide you a deal -- a great deal of additional time to have the audit, didn't he?

A. Well, we provided him so many documents that we thought he needed more time too.

29. The whole tenor of Mr. Smith's testimony was to acknowledge that he read and understood the January 7 letter to say the NOPA was imminent, but that he knew from his experience the NOPA was "not necessarily" imminent. Notably, when asked if he knew at that time that the NOPA was imminent, Mr. Smith did not say that he did not know that because he did not receive or read the January 7 letter when it was sent to him by e-mail.

30. Mr. Smith provided answers to these and several other questions about what he did or did not do in response to the January 7 letter. It was not until after an objection by WKDR's counsel that, as before, Mr. Smith backtracked to say that he did not receive the letter.

31. In making the finding that Mr. Smith was untruthful when he testified that he had not received the January 7 letter, the undersigned had the distinct opportunity to observe the demeanor of Mr. Smith during testimony on this issue. He was not credible and his belated denial is not credited.

32. The undersigned finds that Mr. Smith received the January 7 letter, reviewed it, and hoped that he could buy more time as he had thought he might be able to.

Testimony of Lisa Weems

33. Ms. Weems is a Revenue Specialist III for the Department. She has worked for the Department, in its Compliance Standards Section, for over 15 years. In addition to other tasks, Ms. Weems is responsible for printing NOPAs to send out to taxpayers and their representatives. Ms. Weems testified in great detail about the process she uses to send out NOPAs.

34. When a NOPA is issued, it is uploaded to the Department's system overnight and cannot be printed until the following morning. Because of this, Ms. Weems sends out NOPAs only four days a week—Tuesdays, Wednesdays, Thursdays, and Fridays.

35. Ms. Weems prints and mails out approximately 400 NOPAs per week. On the day of the final hearing, she had mailed out 88 NOPAs.

36. Ms. Weems has a system in place to keep track of the NOPAs she sends out.

37. Ms. Weems clearly and credibly testified about the process she used to send out NOPAs and when and by what means she used to send the NOPA to WKDR and its representative in this case.

38. Each NOPA is mailed out in a packet that includes four documents: the NOPA, NOPA Remittance Coupon, Tax Audit Satisfaction Survey, and a document titled How to Pay Your Audit Assessment and Notice of Taxpayer Rights. The packets are sent by USPS first-class mail.

39. WKDR's NOPA was issued on January 13, 2020. It had to load in the Department's system overnight, so it was printed on January 14, 2020.

40. WKDR's NOPA assessed taxes of \$801,967.01, a penalty of \$200,491.75, and interest of \$166,431.12, for a total due by WKDR of \$1,168,889.88 following the audit.³

³ The amount of the taxes assessed and penalty remained the same as was listed in the Notice of Intent to Make Audit Changes. The amount of the interest had increased. The interest listed in the Notice of Intent to Make Audit Changes was for the period up to November 14, 2019.

41. The NOPA specified that the deadline to request a formal hearing before DOAH was May 12, 2020, or 60 days from the date the assessment becomes a final assessment.

42. The Notice of Taxpayer Rights provided detailed instructions on how to contest the assessment and provided further details on the timelines and deadlines to do so.

43. Ms. Weems sent WKDR and Mr. Smith copies of the NOPA by USPS first-class mail on January 14, 2020.

44. On January 14, 2020 (the day after the NOPA was uploaded), Ms. Weems printed an original and copy of WKDR's NOPA. She placed the original NOPA and the other three documents in a window envelope, addressed to WKDR at 851 South Main Street.

45. A copy of the NOPA, along with the three other documents, were placed in another envelope, addressed to Mark Smith, CPA, at his business mailing address, 115 Tamiami Trail.

46. Ms. Weems testified that she created a mail log sheet, wrapped the log sheet around the envelopes, and placed both of these NOPA envelopes in the outgoing mail basket.

47. After placing the items in the outgoing mail basket, a Department employee from Building L picks up the outgoing mail and mails it out. Ms. Weems testified that she has mailed NOPAs this way for over 10 years.

48. Ms. Weems testified that it was her practice, and what she was taught by the Department, to send NOPAs that had assessments for over \$100,000.00 by fax and e-mail, in addition to regular mail.⁴ WKDR's assessment was for an amount greater than \$100,000.00.

49. On January 16, 2020, Ms. Weems sent a copy of the NOPA to Mr. Smith by fax transmission.

⁴ It must be noted that the Department's internal policy to send NOPAs with assessments over \$100,000.00 by e-mail and fax is an unadopted rule; however, it is not necessary to rely on it as the basis for the determination in this matter. *See* § 120.57(1)(e)1., Fla. Stat.

50. Ms. Weems sent the fax to Mr. Smith's fax number, which was provided on the POA form. Ms. Weems used a fax coversheet when sending the fax. The coversheet recorded several important pieces of information. It provided the case number and the taxpayer's name (WKDR). Two boxes on the fax coversheet were checked—a box indicating there was a "POA" (Power of Attorney) in the file and a box indicating the NOPA was to be sent to the "POA."

51. Ms. Weems also made some notes on the fax coversheet. She wrote: "original notice mailed 1/14/20," "email: mark@swagcpa.com," and "(8) pages." Ms. Weems testified that the reference to eight pages represented the amount of pages she faxed. These pages included the four documents sent by USPS first-class mail mentioned above.

52. After faxing the documents to Mr. Smith's fax number, Ms. Weems received a fax transmission report. The report indicated "Results OK." The term "OK" on a fax transmission report is generally accepted as meaning that the transmission was completed successfully.

53. On January 16, 2020, Ms. Weems also sent a copy of the NOPA and Notice of Taxpayer Rights to Mr. Smith by e-mail.

54. Ms. Weems sent the e-mail to Mr. Smith at mark@swagcpa.com—the e-mail address she obtained from Mr. Smith's office, and which he confirmed was his through testimony at the hearing.

55. The e-mail's subject line stated "Audit Number 200262550-010 WKDR II, INC." The e-mail stated as follows:

1) Please respond back to me by e-mail letting me know you did receive the Notice of Proposed Assessment (Nopa) and Taxpayer Rights by Email and Fax please.

2) Good afternoon, Mr. Smith. I'm e-mailing you the Notice of Proposed Assessment (Nopa) & Taxpayer Rights. I also faxed you the Notice of Proposed Assessment (Nopa) & Taxpayer Rights to fax number 941-866-7691. The Original Notice of

Proposed Assessment (Nopa) & Taxpayer Rights
was mailed out on 1/14/2020. Any questions call the
Nopa Line at 850-617-8565. Thanks, Lisa Weems.

56. The e-mail included an attachment labeled "3125_001.pdf."
Ms. Weems testified that the attachment was a copy of the NOPA and
Taxpayer Rights.

57. Ms. Weems requested a "delivery receipt" and "read receipt" through
her e-mail platform for the e-mail she sent to Mr. Smith. This was her
customary practice when sending e-mails.

58. A few seconds after sending her e-mail, she received a "delivery
receipt" confirmation that the e-mail was delivered to mark@swagcpa.com.

59. Shortly thereafter, Ms. Weems received a "read receipt" confirmation
that her e-mail was received by Mr. Smith and was "read."

60. The use of delivery and read receipts are not novel practices. Delivery
and read receipts are used by a sender of an e-mail to confirm that the e-mail
sent has been delivered to the addressee and, subsequently "read," that is,
opened by the recipient.

61. Ms. Weems keeps a monthly log of the NOPAs she sends out by fax
and e-mail. Ms. Weems's monthly log for January 2020 includes entries that
confirm she sent the WKDR NOPA by e-mail and fax to Mr. Smith at the
contact information he provided.

62. In addition to her personal monthly log, Ms. Weems also used SAP—a
Department computer system that employees work in every day—to
document her activities. On January 16, 2020, Ms. Weems made a notation in
SAP that stated as follows: "I faxed the Notice of Proposed Assessment
(NOPA) & taxpayer rights to Mark Smith on 1/16/20 to fax number 941-866-
7691. I e-mailed the Notice of Proposed Assessment (NOPA) and taxpayer
rights to Mark Smith on 1/16/20 to e-mail address (mark@swagcpa.com). See
attachments and notes."

Testimony of Mark Smith

63. Mr. Smith testified that he did not receive the NOPA by USPS first-class mail, fax, or e-mail. If the undersigned took Mr. Smith's testimony as true, all three of the Department's avenues of sending the NOPA failed.

64. Mr. Smith testified that the NOPA, sent by USPS first-class mail, in the same fashion used for several other letters that he had received from the Department, was not received.

65. Other than Mr. Smith's denial, WKDR provided no evidence that the NOPA and accompanying documents Ms. Weems mailed in separate packages to WKDR at its address and to WKDR's representative's address were not received.

66. Mr. Smith testified that during the time the NOPA was sent, his business utilized an electronic faxing service called MyFax.com. Through this service, he received faxes in e-mail format, with the contents of the fax attached to the e-mail as a PDF document.

67. Mr. Smith testified that he did not receive the fax from Ms. Weems. Mr. Smith also testified that he rarely read faxes because "90 plus percent of our faxes are payroll-related" and belonged to his business partner. Mr. Smith did not credibly explain how he comes to know about the ten percent of faxes directed to him. While perhaps his business partner screens faxes, it is inconceivable that a business firm would not ensure that incoming faxes are directed to the person to whom they are sent. That is particularly true where, as here, Mr. Smith has provided his business fax number as a means to give him notices regarding WKDR's audit.

68. Although the Department provided documentation of a delivery and read receipt of the NOPA sent by e-mail to Mr. Smith, Mr. Smith testified that he did not receive it. Mr. Smith offered no credible explanation for the delivery and read receipts. Once again, it is not credible that a CPA who serves as the POA for taxpayer WKDR would not be reviewing e-mails delivered to his e-mail address, when his office has provided that e-mail

address to the Department. Notably, he acknowledged reviewing other e-mail communications from the Department with regard to WKDR's audit. Mr. Smith's feigned ignorance of an e-mail delivered to him and opened by him is not credible and is not credited.

69. The competent substantial evidence establishes that the Department mailed the NOPA to both Mr. Smith and WKDR at the addresses provided on the POA form.

70. The testimony that Mr. Smith did not receive the NOPA is not credible. WKDR did not deny that it received the NOPA mailed to it; WKDR offered no testimony on the subject.⁵ The NOPA was mailed to the same addresses provided by Mr. Smith and Mr. Plattner on the POA form and used by the Department to successfully communicate with Mr. Smith during the audit.

71. WKDR and Mr. Smith were on notice that a NOPA was forthcoming. The Department advised WKDR and Mr. Smith by letter through regular mail and e-mail, on at least two occasions, that a NOPA was going to be issued and that the Department anticipated an assessment of additional taxes of approximately \$801,967.00.

72. The Department provided notice of the NOPA in a manner reasonably calculated to inform WKDR and its representative of WKDR's rights and of the deadlines to take action to protect those rights.

73. WKDR and the Department communicated frequently during the audit, but after issuance of the NOPA, communications with WKDR and Mr. Smith ceased for several months. Mr. Smith did not reach out to the Department to find out why communications ceased. The reasonable inference is that Mr. Smith was fully aware of why the previous communications during the audit stopped: because the audit had culminated

⁵ In its post-hearing submittal, WKDR argued that the NOPA mail should have been sent to Mr. Plattner. But the NOPA package was addressed to WKDR, the taxpayer, at the mailing address given on the NOPA. WKDR had the opportunity in the POA form to designate Mr. Plattner as the taxpayer contact person but chose not to do so.

in the NOPA and it was up to WKDR to contest the NOPA in a timely hearing request.

74. On or around February 18, 2021, the Department issued an NIL against WKDR, by which it notified WKDR that it intended to freeze funds from WKDR's bank account in the amount of \$999,999.99.

75. The NIL provided that WKDR had 21 days from the date of receipt of the NIL to dispute the matter.

76. On February 19, 2021, WKDR submitted a petition for a chapter 120 administrative hearing to challenge the NOPA. WKDR's petition challenging the Department's NOPA was filed with the Department 403 days after the date on the NOPA (January 13, 2020) and 286 days after the deadline for filing a petition to request an administrative hearing had passed.

77. On February 23, 2021, WKDR timely filed a petition for an administrative hearing to dispute the NIL. WKDR's dispute of the NIL is solely based on its challenge to the NOPA, and its claim that it did not receive the NOPA when issued the year before.

78. WKDR failed to timely exercise its opportunity to protest the amount of the Department's assessment, the underlying audit findings, and the methods the Department used to reach the amount in the assessment.

79. There is no claim by WKDR in this case that the content of the Notice of Taxpayer Rights was unclear regarding the deadline to request a hearing or the manner in which a hearing must be requested; its claim is solely that it did not receive the NOPA and the accompanying Notice of Taxpayer Rights, a claim which is not credible.

80. In sum, the persuasive and credible evidence adduced at hearing demonstrates that the Department sent the NOPA to WKDR's representative by USPS first-class mail, e-mail, and fax, and to WKDR directly by USPS first-class mail; and that Mr. Smith received the NOPA by USPS first-class mail, e-mail, and fax, and that WKDR received the NOPA by USPS first-class mail.

81. WKDR did not submit a timely request for hearing to dispute the NOPA.

CONCLUSIONS OF LAW

82. DOAH has jurisdiction over the parties and the subject matter of this cause pursuant to sections 120.569, 120.57(1), 120.80(14), and 72.011(1)(a), Florida Statutes.

83. Section 120.80(14) provides as follows:

(b) Taxpayer contest proceedings.—

1. In any administrative proceeding brought pursuant to this chapter as authorized by s. 72.011(1), the taxpayer shall be designated the "petitioner" and the Department of Revenue shall be designated the "respondent," except that for actions contesting an assessment or denial of refund under chapter 207, the Department of Highway Safety and Motor Vehicles shall be designated the "respondent," and for actions contesting an assessment or denial of refund under chapters 210, 550, 561, 562, 563, 564, and 565, the Department of Business and Professional Regulation shall be designated the "respondent."

2. In any such administrative proceeding, the applicable department's burden of proof, except as otherwise specifically provided by general law, shall be limited to a showing that an assessment has been made against the taxpayer and the factual and legal grounds upon which the applicable department made the assessment.

3.a. Prior to filing a petition under this chapter, the taxpayer shall pay to the applicable department the amount of taxes, penalties, and accrued interest assessed by that department which are not being contested by the taxpayer. Failure to pay the uncontested amount shall result in the dismissal of the action and imposition of an additional penalty of 25 percent of the amount taxed.

b. The requirements of s. 72.011(2) and (3)(a) are jurisdictional for any action under this chapter to contest an assessment or denial of refund by the Department of Revenue, the Department of Highway Safety and Motor Vehicles, or the Department of Business and Professional Regulation.

84. Section 72.011(2) provides, in pertinent part:

(2)(a) An action may not be brought to contest an assessment of any tax, interest, or penalty assessed under a section or chapter specified in subsection (1) more than 60 days after the date the assessment becomes final. An action may not be brought to contest a denial of refund of any tax, interest, or penalty paid under a section or chapter specified in subsection (1) more than 60 days after the date the denial becomes final.

(b) The date on which an assessment or a denial of refund becomes final and procedures by which a taxpayer must be notified of the assessment or of the denial of refund must be established:

- 1. By rule adopted by the Department of Revenue;*
- 2. With respect to assessments or refund denials under chapter 207, by rule adopted by the Department of Highway Safety and Motor Vehicles;*
- 3. With respect to assessments or refund denials under chapters 210, 550, 561, 562, 563, 564, and 565, by rule adopted by the Department of Business and Professional Regulation; or*
- 4. With respect to taxes that a county collects or enforces under s. 125.0104(10) or s. 212.0305(5), by an ordinance that may additionally provide for informal dispute resolution procedures in accordance with s. 213.21. (emphasis added).*

85. This is a bifurcated proceeding. The issue before the undersigned in this proceeding is whether the Department issued a NOPA that triggered the

jurisdictional time limitations of section 72.011. *See also* § 120.80(14)(b)3.b., Fla. Stat. If so, the issue becomes whether WKDR is jurisdictionally barred from contesting the tax assessment by failing to timely petition the Department for a hearing. A determination that WKDR's petition purporting to contest the NOPA was untimely, such that WKDR is jurisdictionally barred from contesting the NOPA would fully resolve these proceedings, as the undersigned would lack jurisdiction to hear the petitions on the merits.

86. The Department asserts that WKDR is jurisdictionally time-barred from contesting the Department's tax assessment (Case No. 21-0845) and the subsequent freeze of WKDR's bank account to attempt to collect on the assessment (Case No. 21-0844).

87. The burden of proof in an administrative proceeding, absent a statutory directive to the contrary, is on the party asserting the affirmative of the issue. *Dep't of Transp. v. J.W.C. Co.*, 396 So. 2d 778 (Fla. 1st DCA 1981); *see also Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co.*, 670 So. 2d 932, 935 (Fla. 1996). The standard of proof is the preponderance of the evidence standard. § 120.57(1)(j), Fla. Stat.

88. As the party asserting the affirmative of the issue, the Department has the burden of proving by a preponderance of the evidence that it provided notice of the issuance of the NOPA to WKDR and that WKDR did not timely dispute it.

89. After the Department assesses taxes set forth in a NOPA, a taxpayer may contest the assessment as specified in section 72.011.

90. Pursuant to section 72.011(2), a taxpayer has 60 days from the date an assessment becomes final to file a petition for an administrative hearing. The requirements of section 72.011(2) are jurisdictional; failure to file a petition in that time period precludes DOAH from entertaining jurisdiction over the matter. *See Dep't of Rev. v. Nu-Life Health & Fitness Ctr.*, 623 So. 2d 747, 752 (Fla. 1st DCA 1992); *see also* § 72.011(5), Fla. Stat.

91. Section 72.011 requires the Department to adopt rules that establish the date an assessment becomes final and procedures by which a taxpayer must be notified of the assessment.

92. Pursuant to its rulemaking authority in sections 72.011(2), 213.06(1), and 213.21(1), Florida Statutes, the Department promulgated Florida Administrative Code Rule 12-6.003 to implement sections 72.011(2), 213.21(1), and 213.34, Florida Statutes.

93. Rule 12-6.003(1) partially carries out the legislative mandate in section 72.011(2)(b)1. The rule, among other things, clearly establishes the date an assessment becomes final. It provides in pertinent part:

(1)(a) A taxpayer may secure review of a Notice of Proposed Assessment (Assessment) by implementing the provisions of this section.

(b) To secure review of an Assessment, a taxpayer must file a written protest postmarked or faxed within 60 consecutive calendar days (150 consecutive calendar days if the Assessment is addressed to a person outside the United States) from the date of issuance on the Assessment.

(c) Protests postmarked or faxed more than 60 consecutive calendar days (150 consecutive calendar days if the Assessment is addressed to a person outside the United States) after the date of issuance on the Assessment will be deemed late filed, and the Assessment becomes final for purposes of chapter 72, F.S., upon the expiration of 60 consecutive calendar days (150 consecutive calendar days if the Assessment is addressed to a person outside the United States) after the date of issuance on the Assessment, unless the taxpayer has timely secured a written extension of time within which to file a protest.

(d)1. A taxpayer may request an extension of time for filing a protest by mailing or faxing a written request to the address or fax number designated on the Assessment. In order for the taxpayer's request

to be considered timely, the request must be postmarked or faxed within 60 consecutive calendar days (150 consecutive calendar days if the Assessment is addressed to a person outside the United States) from the date of issuance on the Assessment. Each extension of time will be for 30 consecutive calendar days. Within a 30 consecutive calendar day extension period, the taxpayer may submit a request in writing to the address or fax number designated on the Assessment for an additional 30 consecutive calendar day extension within which to submit a written protest.

2. Failure to mail or fax the written protest or failure to mail or fax a written request for an additional extension within a 30 consecutive calendar day extension period shall result in forfeiture of the taxpayer's rights to the proceedings provided by this rule and the proposed assessment will become a final assessment for purposes of chapter 72, F.S., at the expiration of the extended filing period. (emphasis added).

94. The rule does not define the term "date of issuance," which is the operative date when calculating the 60-day period to determine finality, but it does not have to. The most reasonable interpretation of the "date of issuance on the assessment" issued to WKDR is the date listed at the top of the NOPA—January 13, 2020.

95. The NOPA specifically stated that the deadline to request a formal hearing before DOAH was May 12, 2020, or 60 days from the date the assessment becomes a final assessment.

96. It is clear that the Department has promulgated a rule that satisfies the first directive of the statute—it establishes the date on which an assessment becomes final. It is equally clear that the rule does not satisfy the statute's second directive—it does not set forth procedures by which a taxpayer must be notified.

97. The Department argues that the POA form adopted and incorporated by reference in Florida Administrative Code Rule 12-6.0015 (titled Criteria for Qualified Representatives), sets forth the "procedures" required by section 72.011(2). Consistent with its title, rule 12-6.0015 speaks to who may represent a person in a matter before the Department as a qualified representative.

98. The POA form is the form used by taxpayers to designate attorneys or other qualified representatives to communicate with the Department on their behalf. The form provides information on what it means to be a qualified representative, and requires those completing the form to provide contact information for the taxpayer and its qualified representative if one is designated. The only portion of the form that could be said to arguably set out any "procedures" is section 6, which provides that receipt of communications from the Department by either the representative or the taxpayer will be considered receipt by both. But nothing in the POA form addresses the procedures by which the taxpayer is to be notified of an assessment.

99. The argument that the POA form establishes procedures by which the taxpayer must be notified is rejected.

100. WKDR argues that the Department's failure to enact a rule adopting procedures prevents the Department from being able to meet its burden of proving that it provided notice of the NOPA to WKDR. WKDR argues that if there is no rule explaining the procedure by which a taxpayer must be notified of an assessment, it is impossible to determine whether notice to WKDR was legally sufficient. Accepting WKDR's argument would mean that the Department cannot and has not issued any legally sufficient NOPAs to notify taxpayers.

101. In *State of Florida, Department of Revenue v. Ray Construction of Okaloosa County*, 667 So. 2d 859 (Fla. 1st DCA 1996), the Court rejected this argument. The Court overturned the trial court's ruling that the 60-day deadline in section 72.011(2) was tolled because the Department failed to

sufficiently promulgate rules of procedure by which the taxpayer shall be notified as required by section 72.011(2). The Court held that "the absence of a rule does not overcome the fact of actual notice[.]" *Id.* at 862.

102. The undersigned finds that the absence of a rule that promulgates the "procedures" by which taxpayers are to be notified of assessments does not overcome the fact that WKDR was actually notified of the NOPA. The Department's failure to promulgate rules of procedure for notice does not nullify the Department's issuance of every NOPA, including the one at issue in this case. While the absence of a promulgated procedural rule might foreclose the Department from relying on constructive notice in a given case, the absence of a rule cannot overcome the fact of actual notice as found here.

103. The Department proved by a preponderance of the evidence that it sent the NOPA by U.S. first-class mail to WKDR and its representative, Mr. Smith.

104. Proof of mailing of a document to the correct address creates a presumption that the item mailed was, in fact, received. *W.T. Holding, Inc. v. State Ag. for Health Care Admin.*, 682 So. 2d 1224, 1225 (Fla. 4th DCA 1996). "[P]roof of general office practice satisfies the requirement of showing due mailing." *See Brown v. Giffen Indus., Inc.*, 281 So. 2d 897, 900 (Fla. 1973). The presumption, however, is rebuttable. *W.T. Holding, Inc.*, 682 So. 2d at 1225. "[T]he denial of receipt does not automatically overcome the presumption but instead creates a question of fact which must be resolved by the trial court." *Scutieri v. Miller*, 584 So. 2d 15, 16 (Fla. 3d DCA 1991).

105. WKDR offered no evidence to rebut the presumption that it received the NOPA.

106. Mr. Smith's testimony claiming he did not receive the NOPA mailed to him was not credible and therefore insufficient to rebut the presumption of receipt.

107. In addition, the undersigned concludes that the Department proved by a preponderance of the evidence that it sent the NOPA by e-mail and fax

to WKDR's representative on January 16, 2020, and that it was received in both formats.

108. After receiving actual notice of the assessment and actual notice of the procedures and information to contest the assessment, WKDR did not dispute the NOPA within 60 days of the date of issuance on the NOPA, or within 60 days thereafter (that is, within 60 days after the assessment became final).

Conclusion

109. The Department met its burden of proving that it served a NOPA with an issuance date of January 13, 2020, on WKDR and its representative by U.S. first-class mail, and, in addition, on WKDR's representative by e-mail and fax. The Department met its burden of proving that the NOPA and Notice of Taxpayer Rights were received by WKDR and by its representative. WKDR had actual notice of the NOPA and of its right to contest it.

110. WKDR submitted its petition for a formal administrative hearing to contest the assessment well after May 12, 2020, which is 60 days after the assessment became final. Because WKDR failed to file a timely challenge pursuant to sections 72.011 and 120.80(14)(b)3.b., WKDR's challenge to the assessment (Case No. 21-0845) is jurisdictionally time-barred.

111. Because the only basis for WKDR's challenge to the Department's Notice of Intent to Levy (Case No. 21-0844) was WKDR's untimely challenge to the underlying assessment in Case No. 21-0845, Case No. 21-0844 also may not proceed.

112. DOAH does not have jurisdiction to hear the merits of Case Nos. 21-0844 and 21-0845.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Revenue enter a final order dismissing DOAH Case Nos. 21-0844 and 21-0845.

DONE AND ENTERED this 30th day of November, 2021, in Tallahassee,
Leon County, Florida.



JODI-ANN V. LIVINGSTONE
Administrative Law Judge
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of November, 2021.

COPIES FURNISHED:

Mark S. Hamilton, General Counsel
Department of Revenue
Post Office Box 6668
Tallahassee, Florida 32314-6668

Kristian Oldham, Esquire
Department of Revenue
Post Office Box 6668
Tallahassee, Florida 32314-6668

Jacek Stramski, Esquire
Department of Revenue
Post Office Box 6668
Tallahassee, Florida 32314-6668

Doug Plattner
3118 Walter Travis Drive
Sarasota, Florida 34240

James H. Sutton, Esquire
Moffa, Sutton & Donnini, PA
8875 Hidden River Pkwy, Suite 230
Tampa, Florida 33637-2087

J. Clifton Cox, Esquire
Office of the Attorney General
Revenue Litigation Bureau
The Capitol, Plaza Level 01
Tallahassee, Florida 32399

Allison M. Dudley, Esquire
Office of the Attorney General
Revenue Litigation Bureau
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

John G. Savoca, Assistant Attorney General
Office of the Attorney General
Revenue Litigation Bureau
The Capitol, Plaza Level 01
Tallahassee, Florida 32399

Michael J. Bowen, Esquire
Akerman LLP
50 North Laura Street, Suite 3100
Jacksonville, Florida 32202

James A. Zingale, Executive Director
Department of Revenue
Post Office Box 6668
Tallahassee, Florida 32314-6668

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.